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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Summary of Developments . . .

Education

PUBLIC SCHOOLS: "Private and public opinion as to the desirability of desegregation in the community" provides no legal basis for delaying a prompt start toward the admission of children to public schools without regard to race or color, the United States Court of Appeals for the Fifth Circuit declared. It reversed the decision of a federal district court in *Texas* which had dismissed a school desegregation case as being "precipitate" (p. 655). The same Court of Appeals also reversed the decision of another federal district court in a *Texas* desegregation case in which the lower court had dismissed the action on the grounds that no plan had been evolved to end segregation (p. 649). The *North Carolina* Supreme Court decided that a suit for desegregation of public schools in that state could not be brought as a class action, as that state's "School Placement Law" requires such actions to be brought individually (p. 646).

Suits in federal district courts seeking admission to public schools on a racially non-discriminatory basis were dismissed without trial in *Georgia* (p. 645) because of failure to prosecute, and in *Maryland* (p. 645) because the cause had become moot by reason of the withdrawal of state authorities from the operation of the school concerned. In *Alabama* (p. 717), *Louisiana* (p. 728), and *South Carolina* (p. 730), the legislatures enacted laws concerned with school attendance, while *Arkansas* (p. 717), *North Carolina* (p. 728), and the *United States Congress* (p. 715) were considering legislative action with respect to desegregation questions. The Board of Education of Louisville, *Kentucky* (p. 779), announced a desegregation plan. In Prince Edward County, *Virginia*, scene of one of the original *School Segregation Cases*, resistance to integration was supported formally by county authorities (p. 780).

COLLEGES AND UNIVERSITIES: In *Louisiana* legislation was enacted to tighten admission requirements to state supported colleges and universities (p. 730) by requiring a recommendation for each prospective enrollee from the county or parish superintendent of education and high school principal. Legislation enacted in *South Carolina* would remove financial support from and require the closing of any institution required to admit a pupil under court order (p. 731). That legislation would also require the closing of the state college for Negroes if any other institution is required to close.

SCHOOL BONDS: The validity of school bonds issued under authorization enacted prior to the decision of the United States Supreme Court in the *School Segregation Cases*, the proceeds of which might be used for integrated school facilities, was attacked in state and federal courts in *North Carolina* and in state courts in *Virginia*. The *North Carolina* Supreme Court found that provisions of the state constitution and statutes setting up a system of state public schools were severable from provisions requiring mandatory separation of the races. While the latter provisions, the court held, had been invalidated by the *School Segregation Cases*, the school bonds could legally be issued and the proceeds used for school facilities notwithstanding that invalidity (p. 658). The Supreme Court of Appeals of *Virginia* found that the decision in the *School Segregation Cases* was not material in determining the validity of a school bond issue in that state (p. 666).

Transportation

A three-judge federal district court in *Alabama* denied the validity of state and local laws requiring racial segregation on city buses in Montgomery. The court held that the separate-but-equal doctrine announced in *Plessy v. Ferguson* has been impliedly overruled as applied to public transportation facilities (p. 669). An injunction against enforcement of the Alabama laws was granted but suspended pending an appeal. The case is being appealed to the United States Supreme Court.

In *South Carolina* a federal district court held a rehearing in the *Flemming* case on remand (see 1 Race Rel. L. Rep. 183 and 513). The case was dismissed on the ground that the decision of the United States Court of Appeals for the Fourth Circuit applying the doctrine of the *School Segregation Cases* to public transportation could not be made retroactive to the com-

mission of the act for which damages were sought (p. 679). The *Louisiana* legislature enacted a statute to require separate waiting rooms for white intrastate and for interstate and Negro intrastate passengers of common carriers in that state (p. 741). The use of federal funds to construct segregated airport facilities was prohibited by the Civil Aeronautics Administration (p. 783).

Employment

City ordinances of two cities in *Pennsylvania* establishing fair employment practices commissions are printed in this issue (pp. 742, 746). The Executive Order establishing the President's Committee on Government Employment Policy and the regulations and procedures of that Committee are also set out (p. 784).

A *New York* Supreme Court has affirmed the action of the State's Commission Against Discrimination in which it found that an airline had not discriminated on the basis of race in refusing to employ a Negro (p. 685). The *South Carolina* legislature has enacted legislation to prohibit the employment of members of the NAACP by the state or a political subdivision thereof (p. 751).

Recreational Facilities

Based on a suit brought by Negroes in Pensacola, *Florida*, a federal district court required that city to put into effect reasonable regulations for the non-discriminatory use of city recreational facilities (p. 681). The city of Delray Beach, *Florida*, was also involved in action seeking admission to its municipal recreational facilities on a racially non-discriminatory basis (p. 680), and enacted several ordinances in consequence (p. 733).

In *Louisiana* the legislature enacted a statute to interpose the state's police powers so as to enforce segregation in its recreational facilities (p. 731). The *South Carolina* legislature withdrew authority of certain state officials to admit persons to state parks (p. 738) and the *Alabama* legislature made provision for closing or disposal of state parks (p. 732). The Attorney General of *Vermont* issued an opinion in which he held that the state might not continue to carry listings in state publications of hotels and other accommodations which practiced discrimination (p. 802).

Other Developments

In *Louisiana* the legislature enacted a resolution of interposition (p. 753) and voted to continue a Joint Legislative Committee for the purpose of "carrying on and conducting the fight to maintain segregation of the races" (p. 755).

The National Association for the Advancement of Colored People was enjoined by an *Alabama* state court from carrying on any activities or qualifying to do business in Alabama (p. 707). In *South Carolina* the state Supreme Court upheld a complaint for libel brought by an attorney against a local NAACP chapter and individual members thereof because of statements made concerning a court case (p. 709).

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UNITED STATES SUPREME COURT

MISCELLANEOUS ORDERS

The United States Supreme Court:

Denied certiorari (i.e., refused to review) in the following cases:

Adams v. Lucy (Prior decisions 134 F.Supp. 235, 1 Race Rel. L. Rep. 85; 228 F.2d 619, 1 Race Rel. L. Rep. 88, in which the admission of the Negro plaintiff to the University of Alabama was direced.) 351 U.S. 931, 76 S.Ct. 790 (No. 892, May 14, 1956).

Dinwiddie v. Brown (Prior decision 230 F.2d 465, 1 Race Rel. L. Rep. 568, in which no violations of federal civil rights acts were found in cases involving title to real property.) 351 U. S. 971, 76 S.Ct. 1041 No. 784, Misc., June 4, 1956).

Denied motions for leave to file petitions for writs of mandamus to compel the convening of three-judge federal district court in the following cases:

Orleans Parish School Board v. Bush (Prior decision 138 F.Supp. 336 and 337, 1 Race Rel. L. Rep. 305 and 306, in which the federal district court had directed the admission of Negro plaintiffs to the public schools of Orleans Parish, Louisiana, without regard to race or color. A three-judge court had first determined that it did not have jurisdiction in the case.) 351 U.S. 948, 76 S.Ct. 854 (No. 672, Misc., May 28, 1956).

Booker v. Board of Education (Prior decision 1 Race Rel. L. Rep. 118, in which the single-judge federal district court had approved a plan for gradual desegregation of certain state colleges and universities in Tennessee.) 351 U.S. 948, 76 S.Ct. 856 (No. 692, Misc., May 28, 1956).

Cases Docketed

The following cases were docketed in the United States Supreme Court without action when the Court adjourned on June 11, 1956.

Petitions for writ of certiorari:

Conley v. Gibson, No. 109, filed May 24, 1956. (Prior decision 138 F.Supp. 60; 229 F.2d 436; 1 Race Rel. L. Rep. 556, involving alleged racial discrimination by a railway company and an "all white" union local against a Negro local.)

Central of Georgia Railway Co. v. Jones, No 83, filed May 10, 1956, (Prior decision 229 F.2d 648, 1 Race Rel. L. Rep. 558, involving alleged racial discrimination within a railway union.)

Fikes v. Alabama, No. 53, filed November 9, 1955. (Prior decision 81 So.2d 203, 1 Race Rel. L. Rep. 200, involving alleged racial discrimination in the selection of juries in Alabama.)

The following cases have been docketed since adjournment of the Court:

Petitions for writ of certiorari:

Doby v. Brown, No. 228, filed July 2, 1956. (Prior decision 232 F.2d 504, 1 Race Rel. L. Rep.

664, involving validity of North Carolina school bond issue.)

Department of Conservation and Development v. Tate, No. 238, filed July 6, 1956. (Prior decision 231 F.2d 615, 1 Race Rel. L Rp. 530, involving admission to and leasing of parks in Virginia.)

EDUCATION
Public Schools—Georgia

Mattie JEAN et al. v. E. S. COOK, etc., comprising the Board of Education of the City of Atlanta, et al.

United States District Court, Northern District, Georgia, May 16, 1956, Civ. No. 3923.

SUMMARY: In 1950 Negro children in Atlanta, Georgia, had filed an action in federal district court against school officials of that city seeking to require their admission to public schools without regard to race or color. The case was not brought to trial. The court in May, 1956, thereupon dismissed the case for failure to prosecute. The order of the court follows:

HOOPER, District Judge.

It appearing to the Court that the above case was filed in this Court on September 19, 1950 and that since the date of filing plaintiffs or their attorneys have taken no steps or proceedings to make the case ready for trial, it is, by the Court

ORDERED that the case herein be and the same is hereby dismissed pursuant to provisions of Rule 14(c) of this Court.

EDUCATION
Public Schools—Maryland

Betty D. MITCHELL et al. v. Everett J. CONNELLEE et al.

United States District Court, Maryland, December 22, 1955, Civil No. 8013.

SUMMARY: Negro children attending schools on the federal reservation at Bainbridge Naval Training Center in Maryland brought a class action in federal district court to require admission on a racially non-discriminatory basis to those schools. The action was brought against county and state school officials, as well as federal officials in charge of the reservation. County and state officials of Maryland withdrew from the operation of schools on the federal reservation and the case was dismissed as moot. The order of the court dismissing the case follows:

THOMSEN, Chief Judge.

ORDER

The captioned matter having been considered by the Court, and it appearing that the cause has become moot for the reason that school activities will not be carried on by the State of Maryland or any County of said State upon the land of the Federal government at Bainbridge Naval Training Center, it is

ORDERED that this case be, and it is hereby dismissed.

EDUCATION

Public Schools—North Carolina

Albert JOYNER et al. v. the McDOWELL COUNTY BOARD OF EDUCATION.

Supreme Court of North Carolina, May 23, 1956, 92 S.E.2d 795.

SUMMARY: In *Carson v. Board of Education of McDowell County*, 227 F.2d 789, 1 Race Rel. L. Rep. 70 (1955), the United States Court of Appeals for the Fourth Circuit had remanded a suit brought by Negroes in North Carolina seeking desegregation of schools in McDowell County of that state which had been dismissed in the federal district court. The remand order directed the district court to give consideration to North Carolina legislation providing for administrative remedies in school placement disputes (North Carolina Public Laws, 1955 Ch. 366; 1 Race Rel. L. Rep. 240). A class action was subsequently brought in a state court of North Carolina involving some of the plaintiffs in the *Carson* case and others seeking admission of Negro pupils to schools in McDowell County without regard to race or color. The court overruled a demurrer to the petition on the ground that it failed to state a cause of action but sustained a demurrer on the ground of misjoinder of parties and cause and dismissed the action. 1 Race Rel. Law Rep. 515 (1956). On appeal the North Carolina Supreme Court affirmed the judgment of the lower court on the ground that under the School Placement Act the application of each child stood on an individual basis, hence there was a misjoinder of the parties.

[STATEMENT OF FACTS BY THE COURT]

This is a proceeding brought on 27 August 1955 by petitioners who filed with the Board of Education of McDowell County, hereinafter called the Board, a petition "on behalf of their children and themselves, and on behalf of other Negro children and parents similarly situated," in which, in sum and substance, they assert:

(1) That the (unnamed) children for whom they were speaking were eligible to attend public schools in McDowell County, North Carolina, and particularly the school at Old Fort.

(2) That the petitioners carried their children to the Old Fort school on 24 August 1955 and demanded that they then be enrolled in said school; that the principal of said school, acting in conjunction with and under the direction of the Superintendent of Schools of McDowell County, then and there denied to children of petitioners admission to the said Old Fort school.

(3) That the children were denied admission for the reason that school children were "not to be assigned in the schools of McDowell County during the school year 1955-56 on any basis other than that which has previously existed."

(4) That "the primary if not the sole basis upon which children in McDowell County have been assigned to schools has been race or color."

(5) That the Supreme Court of the United States has declared enforced racial segregation in public schools illegal.

(6) That the refusal to admit children of petitioners to the Old Fort school "was based solely and wholly upon race or color."

The petition, following the foregoing allegations sought redress in the following language:

"The undersigned, on behalf of their own children and on behalf of other Negro children and parents similarly situated, petition your Board that you forthwith issue a directive, order or mandate to the aforesaid Superintendent and Principal requiring them forthwith to admit children of petitioners and other Negro children similarly situated to the school and school facilities maintained by your Board in the Town of Old Fort."

The petitioners appeared before the Board on 3 October 1955 in support of their request. In a letter dated 5 January 1956, the petitioners were informed by the secretary of the respondent Board of the Board's denial on 2 January 1956 of petitioners' request to have their children enrolled in the public school in Old Fort,

North Carolina. The denial was in the following language:

"A request on the part of Taylor & Mitchell on behalf of the Negroes at Old Fort to allow Negroes to attend school at Old Fort rather than to be transported to Marion to attend school at Hudgins High, was formally denied by virtue of necessity in that facilities and room are available at Hudgins High and are not available at Old Fort. The motion was made by Mr. Ross, seconded by Mr. Greenlee and duly passed."

The petitioners, through their counsel, gave notice of appeal to the Board by telegram on 13 January 1956 and requested the immediate certification of the record to the Superior Court. The record was duly certified as requested.

In apt time, in the Superior Court, the respondent moved to dismiss the appeal on the ground that the notice of appeal was not given or filed within ten days as required by statute. In addition thereto, the respondent filed a demurrer to the petition and assigned as grounds therefor: (1) that the petition failed to state a cause of action; and (2) that there was a misjoinder of both parties and causes of action.

After hearing argument of counsel for respondent and counsel for petitioners the court being of the opinion that the motion to dismiss should be denied and that the demurrer should be overruled in so far as it pertains to the failure to state a cause of action, but, that the demurrer as it relates to the misjoinder of parties and causes of action should be sustained, entered judgment accordingly. The petitioners appeal to the Supreme Court, assigning error.

[OPINION BY THE COURT]

DENNY, J. At tne threshold of this appeal the Court is confronted with the fact that the questions presented are now academic as to the school year 1955-56. Even so, Chapter 366 of the Session Laws of 1955, codified as G.S. 115-176 through G.S. 115-179, governing the enrollment of pupils in the public schools of North Carolina is of such public importance that the Court deems it appropriate to clarify the procedure thereunder.

The appellants' pertinent assignments of error are directed to the ruling of the court below in sustaining the respondent's demurrer on the grounds of misjoinder of parties and causes of action and to the failure of the court to order a severance of the causes of action, if the court was correct in its ruling as to such misjoinder.

[*Demurrer Sustained*]

A demurrer should be sustained and the action dismissed where there is a misjoinder of parties and causes of action, and the court is not authorized in such cases to direct the severance of the respective causes of action for trial under the provisions of G.S. 1-132. Perry v. Doub, 238 N.C. 233, 77 S.E. 2d 711; Sellers v. Ins. Co., 233 N.C. 590, 65 S.E. 2d 21; Erickson v. Starling, 233 N.C. 539, 64 S.E. 2d 832; Teague v. Oil Co., 232 N.C. 469, 61 S.E. 2d 345; 1d. 232 N.C. 65, 59 S.E. 2d 2; Moore County v. Burns, 224 N.C. 700, 32 S.E. 2d 225; Wingler v. Miller, 221 N.C. 137, 19 S.E. 2d 247.

The Court deems it unnecessary to enter into a discussion of the question of misjoinder in this proceeding. The question is settled by the statutes governing the enrollment of pupils in the public schools of North Carolina and, in the opinion of the Court, they do not authorize the institution of class suits upon denial of an application for enrollment in a particular school.

The provisions of G.S. 115-176 read as follows: "The county and city boards of education are hereby authorized and directed to provide for the enrollment in a public school within their respective administrative units of each child residing within such administrative unit qualified under the laws of this State for admission to a public school and applying for enrollment in or admission to a public school in such administrative unit. Except as otherwise provided in this article, the authority of each such board of education in the matter of the enrollment of pupils in the public schools within such administrative unit shall be full and complete, and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such administrative unit other than the public school in which such child may be enrolled pursuant to the rules, regulations and decisions of such board of education."

It is provided in G.S. 115-178 that, "The parent or guardian of any child, or the person standing *in loco parentis* to any child, who shall apply to the appropriate public school official

for the enrollment of any such child in or the admission of such child to any public school within the county or city administrative unit in which said child resides, and whose application for such enrollment or admission shall be denied, may, pursuant to rules and regulations established by the county or city board of education apply to such board for enrollment in or admission to such school, and shall be entitled to a prompt and fair hearing by such board in accordance with the rules and regulations established by such board. The majority of such board shall be a quorum for the purpose of holding such hearing and passing upon such application, and the decision of the majority of the members present at such hearing shall be the decision of the board. If, at such hearing, the board shall find that such child is entitled to be enrolled in such school, or if the board shall find that the enrollment of such child in such school will be for the best interests of such child, and will not interfere with the proper administration of such school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that such child be enrolled in and admitted to such school."

[*Provision of Statute*]

The provisions of G.S. 115-179 are as follows: "Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard *de novo* in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions."

With respect to the provisions of G.S. 115-178, this Court construes them to authorize the parent to apply to the appropriate public school official for the enrollment of his child or children by name in any public school within the county or city administrative unit in which such child or children reside. But such parent is not authorized to apply for admission of any child or children other than his own unless he is the guardian of such child or children or stands *in loco parentis* to such child or children. In the event a parent, guardian or one standing *in loco parentis* of several children should apply for their admission to a particular school, it is quite possible that by reason of the difference in the ages of the children, the grades previously completed, the teacher load in the grades involved, etc., the school official might admit one or more of the children, and reject the others. The factors involved necessitate the consideration of the application of any child or children individually and not *en masse*. Any interested parent, guardian or person standing *in loco parentis* to such child or children, whose application may be rejected, may appeal to the appropriate board for a hearing in accordance with the rules and regulations established by such board. Furthermore, if the board denies the application for admission of such child or children, the aggrieved party may appeal in the manner prescribed by statute (G.S. 115-179) to the superior court, where the matter shall be heard *de novo* before a jury in the same manner as civil actions are tried therein.

Therefore, this Court holds that an appeal to the superior court from the denial of an application made by any parent, guardian or person standing *in loco parentis* to any child or children for the admission of such child or children to a particular school, must be prosecuted in behalf of the child or children by the interested parent, guardian or person standing *in loco parentis* to such child or children respectively and not collectively.

The Court notes that the petitioners did not apply for the admission of their children and other Negro children similarly situated to the school in Old Fort until the 24th day of August 1955, the day the school opened. It would seem

that some rule or regulation might well be promulgated by the county and city boards of education fixing a date reasonably in advance of the opening of school for filing such applications. Judicial notice will be taken of the fact that boards of education must of necessity employ teachers in advance of the opening of school. Teachers are assigned to their particular schools on the basis of the enrollment information in the hands of the respective boards at the time the assignments are made. Hence, it would seem to be extremely desirable if not imperative for the orderly operation of the schools that applications for admission to schools other than those theretofore designated by the board of education or city administrative unit, be made reasonably in advance of the opening of school.

In addition to the assignment of pupils in the manner authorized in the above cited statutes, pupils residing in one administrative unit may be assigned to a school in another administrative unit, pursuant to the provisions contained in Chapter 1372, Session Laws of 1955, sub-chapter VIII, Art. 19, sec. 3, codified as G.S. 115-163. In re Assignment of School Children, 242 N.C. 500, 87 S.E. 2d 911.

An additional reason why this proceeding was properly dismissed is that while it purports to have been brought pursuant to the provisions of our school enrollment statutes, it is not based on an application for assignment relating to named individuals as contemplated by the enrollment statutes, but is in reality a class suit. It is in effect an application for *mandamus*, requiring the immediate integration of all Negro pupils residing in the administrative unit in which the Old Fort school is located, in the Old Fort school. Such a procedure is neither contemplated nor authorized by statute. Therefore, the appeal is dismissed.

Appeal dismissed.

DEVIN, J., took no part in the consideration or decision of this case.

EDUCATION
Public Schools—Texas

Charles BROWN, a minor, by his father and next friend, Walter Brown, Jr., et al. v. Dr. Edwin L. RIPPY, as President of the Board of Trustees of the Dallas Independent School District, Dallas County, Texas, et al.

United States Court of Appeals, Fifth Circuit, May 25, 1956, 233 F2d 796.

SUMMARY: In a class action, Negro school children in Dallas County, Texas, sought a declaration of rights and injunctive relief in a federal district court with respect to their admission to public schools in that county on a non-segregated basis. The district court refused a motion to convene a three-judge district court, found that the public school facilities furnished for white children and Negroes were substantially equal, and held that the United States Supreme Court's implementation decision in the *School Segregation Cases* required that integration be accomplished on the basis of planning to be done by the school officials and the lower courts. The district court further found that no such plan then existed, and dismissed the suit without prejudice. Bell v. Rippy, ——— F.Supp. ———, 1 Race Rel. L. Rep. 318 (D.C.Tex. 1955). On appeal the Court of Appeals, Fifth Circuit, one judge dissenting, held that there was no basis in the evidence nor in law for the action taken by the district court and vacated, reversed and remanded the case.

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM:

The suit was brought by Negro children of school age against the President and members of the Board of Trustees of the Dallas Independent School District and others for a declatory judgment and an injunction. It had for its object the entry of a judgment requiring the defendants to desegregate with all deliberate speed the schools under the jurisdiction, and to cease their practices of segregating plaintiffs

in elementary and high school education on account of race and color.

The claim was that the defendants, though obligated to do so, were conspiring to neglect to proceed as required by law.

The defendants denied that they were proceeding or proposing and conspiring to proceed in violation of law, to force segregation upon plaintiffs on account of their race and color. Alleging in effect that they were proceeding, and would continue, as required in and by the decisions of the Supreme Court, to proceed with all deliberate speed with the change over from segregated to non-segregated schools, they prayed that all relief, declaratory and injunctive, be denied.

When the case was called, instead of a hearing on evidence or agreed facts, there was a running colloquy between judge and counsel, in which, after admitting that at least some of the plaintiffs had sought and been denied admission on a non-segregated basis, the defendants' counsel vainly tried to offer, in explanation and support of their action, evidence of the matters pleaded by them.

Declining to hear the evidence, apparently under the mistaken view that the plaintiffs had agreed to the facts pleaded by defendants, though the record showed the exact contrary, the district judge, determining that the suit was premature, denied the injunction prayed and ordered the suit dismissed without prejudice to the right of plaintiffs to file it at some later date.

Appealing from that order plaintiffs are here insisting that the record shows that the judgment was entered under a complete misapprehension both of the law and of the facts and must be reversed.

The defendants here urging that the action of the court responded to the facts as shown of record and to the law as declared in the decisions of the Supreme Court, insist that the suit was premature and was properly dismissed without prejudice.

We think it quite clear that there is no basis in the evidence for the action taken by the district judge, none in law for the reasons given by him in support of his action. The judgment is accordingly VACATED and REVERSED and the cause is REMANDED with directions to afford the parties a full hearing on the issues tendered in their pleadings.

[*Dissent*]

CAMERON, Circuit Judge, Dissenting.

I.

The Court below stated, as one of its reasons for dismissing the complaint without prejudice, the following:[1]

> "The direction from the Supreme Court of the United States requires that the officers and principals of each institution, and the lower Courts, shall do away with segregation after having worked out a proper plan. That direction does not mean that a long time shall expire before that plan is agreed upon. It may be that the plan contemplates action by the state legislature. It is not for this Court to say, other than what has been said by the Supreme Court in that decision.
>
> "To grant an injunction in this case would be *to ignore the equities that present themselves for recognition and to determine what the Supreme Court itself decided not to determine.* Therefore, I think it appropriate that this case be dismissed without prejudice to refile it at some later date. *Give them some time to see what they can work out, and then we will pass upon that equity.*" [Emphasis supplied.]

The Court below was evidently referring to what the Supreme Court said in its two segregation decisions:

> "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. . . ."[2]
>
> "Full implementation of these constitutional principles may require solution of varied local school problems. *School authorities have the primary responsibility for elucidating, assessing and solving these problems;* courts will have to consider whether the action of school authorities constitutes good faith implementation of

1. It mentioned other grounds arguendo but this is the basic finding.
2. Brown, et al v. Board of Education, etc., May 17, 1954, 347 U.S. 483, 495.

the governing constitutional principles. . . . At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. . . . To that end the courts may consider problems relating to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve system of determining admission to the public schools on a nonracial basis, the revision of local laws and regulations which may be necessary in solving the foregoing problems. . . . " [Emphasis added.][3]

In my opinion, the Court below was justified in using its discretion to dismiss this action without prejudice on the ground that it was prematurely brought. It seems clear that the course of action fixed by the Supreme Court contemplated that school boards and other state officials should take hold of the complex problem and work it out with the aid and in the light of their superior knowledge of the problem in all of its ramifications. These state officials were to work in an administrative capacity under the plans detailed in these two opinions. The Supreme Court recognized that the problem should be viewed as a whole and that time would be required and that the state authorities should be given full primary responsibility, as well as authority, to solve the problem in the light of local conditions. As long as these officials were proceeding in good faith and with deliberate speed to do this, it is clear to me that the Supreme Court did not intend that they should be subjected to harassment by vexatious suits or by the intervention of the courts. It was the "action of the school authorities" which courts were to pass upon at the proper time and after there had been opportunity for such action. The scheme did not contemplate that the courts should anticipate or seek to control such action or should impede it by too close chaperonage. "Action" is defined as "an act or thing done",—i.e. already performed.

The principles controlling in such a situation were announced in a recent decision of the Supreme Court in a situation not unlike that with which we are here dealing.[4]

That case involved the question whether judicial action would be taken to arrest the functioning of the First and Second Renegotiation Acts on constitutional grounds before administrative remedies had been exhausted. The Supreme Court held that such a short-circuiting of the administrative remedy would be "a long overreaching of equity's strong arm", and used this language in reaching that conclusion:

> "The doctrine [exhaustion of administrative remedy] wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention. The very purpose of providing either an exclusive or *an initial and preliminary administrative determination* is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as *foundation for or perchance to make unnecessary later judicial proceedings.* Where Congress [here the Supreme Court] has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to *anticipate the administrative decision* with their own, whether or not when it has been rendered they may intervene . . . . To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination." [Emphasis added.]

Again, in Myers v. Bethlehem Corp.,[5] Mr. Justice Brandeis, citing a score of cases, stated: "The contention is at war with the long settled rule of judicial administration that no one is

3. Brown, et al v. Board of of Education, etc., May 31, 1955, 349 U.S. 294, 299-301.

4. Aircraft and Diesel Equipment Corp. v. Hirsch, et al, 1947, 331 U.S. 752, 767.

5. 1938, 303 U.S. 41, 50-51.

entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedies have been exhausted. . . . Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving the defendant from the necessity of a trial to establish the fact."[6]

And this Court has applied the principle in a series of cases involving claims under the Fourteenth Amendment. The first of these was Cook, et al. v. Davis, 1949, 178 F.2d 595, cert. den. 340 U.S. 811. A District Court in Georgia had intervened by injunction in favor of Davis, who claimed that he was discriminated against as a Negro teacher. This Court wrote an exhaustive opinion in reversing that decision and used this language:

> "The broad principle that administrative remedies ought to be exhausted before applying to a court for extraordinary relief, and especially where the federal power impinges on State activities under our federal system, applies to this case. 'No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, citing many cases relating to relief by injunction. We held in Bradley Lumber Co. v. National Labor Relations Board, 5 Cir., 84 F.2d 97, that the same principle applies to relief by declaratory decree. 'The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity (citing many cases), is of special force when resort is had to the federal courts to restrain the action of state officers.' . . ."[7]

6. And see also Alabama Public Service Commission, et al v. Southern Railway Company, 1951, 341 U.S. 341, 349-350.

7. And see Bates, et al v. Batte, et al, 5 Cir., 1951, 187 F.2d 142, 144. And we applied the rule as "of special importance between the federal courts and state functionaries" when we denied equitable relief to Negroes seeking voting rights in Peay, et al v. Cox, Registrar, 5 Cir., 1951, 190 F.2d 123, 125, Cert. den. 342 U.S. 896.

II.

The situation before the Court below furnishes an excellent illustration of the wisdom and relative necessity of permitting the school authorities to apply their experience, judgment and investigative facilities to the solution of the problem. Dallas County has one hundred twenty school buildings, housing for instruction 78,691 white children and 14,593 Negro children. Each of those schools and each of the children presents a separate problem to be dealt with in the light of many other considerations besides race. It is not humanly possible that the District Courts consider and resolve those problems in all of their details and intricacies.

The Northern District, in which Dallas County is situated, has ninety-nine other counties whose legal business must be handled by three active District Judges. If the Court below is to be compelled to take jurisdiction of this action and try it, there is no reason why every other school child in Dallas County and in the Northern District of Texas, both white and Negro, should not file suit and demand a hearing and procure an adjudication of his own individual problems.

III.

Under accepted equitable principles a court should accept and exercise jurisdiction only when it is made clearly to appear from the pleadings that the school officials are not performing their administrative functions in good faith. The complaint here fails entirely to charge any facts tending to sustain such a thesis and the answer refutes it completely. The Court will presume that the state officials are acting honestly and that they will expeditiously give plaintiffs all relief to which they are entitled. Davis v. Arn, 5 Cir., 1952, 199 F.2d 424.

The complaint alleges that the twenty-seven plaintiffs on September 5, 1955 applied for admission to certain schools in Dallas Independent School District: one applied to a junior high school; eight applied to a high school; and the residue applied to four separate elementary schools. In each instance it is alleged that the principal of the school conspired with the superintendent of public schools to deprive plaintiffs of the right immediately to attend the specified schools based upon their race and color.

The complaint contains no charge at all that the school officials did not act in good faith in denying them such immediate entry or that the facts did not justify such denial. The complaint prayed for a declaratory judgment declaring the statutes of the State of Texas under which defendants assumed to act unconstitutional, and defining the legal rights and relations of the parties; and for injunction, both temporary and permanent against any enforcement by the defendants of the Texas Statutes referred to. The answer contains this statement:

> ". . . Defendants deny there is any scheme or conspiracy to circumvent or evade the law or to deprive any child, student or other person of their civil rights. The principals of the various schools were following the instructions issued to them by the administrative staff. The administrative staff and the district trustees are now and have been making an honest, bona fide, realistic study of the facts to meet the obligations the law has placed upon them to provide adequate public school education and to perfect, as soon as possible, a workable integrated system of public education."

It was further shown from the sworn answer and the stipulations of counsel that the Dallas Public School System has operated for ninety years as a segregated system and that budget procedures looking to the raising of funds by taxation had been formulated and bonds issued on that basis and upon the enumeration of white and Negro students already made. The details of the budget are controlled by state laws and practices, and thereunder statistical data is gathered in January of each year. The budget for the school year had reached an advanced state of preparation when the Supreme Court decision was published on the last day of May, 1955, and it was impossible to make the necessary adjustments and allocations of students and teachers by the beginning of the school year in September, 1955.

In order that all might be advised of this, the superintendent of schools issued a statement on July 13, 1955 advising that a detailed study of all of the problems inherent in desegregating was in progress and the details of that study were set forth. Thirty-five million dollars in bonds had recently been issued and the capital improvements involved therein would have to be changed. Sixty percent of the money for operating the Dallas schools came from the State of Texas, and the Attorney General had ruled that funds could be allocated for the coming year only on the segregated basis existing when appropriations were made and plans for the school year set in motion. Complete chaos and a complete breakdown in public school education for both White and Negro students would result if the school officials should undertake a haphazard effort to deal specially with isolated individuals and the six schools involved in the suit out of the total of one hundred twenty. The situation required an over-all adjustment based upon a consideration of the entire school system, and granting to all individuals and classes the right spelled out in these Supreme Court decisions.

IV.

These facts were known to the plaintiffs and their attorneys when they applied for admission to the six schools mentioned, and when, one week thereafter, this civil action was begun. Anyone willing to accept facts would know that the relief demanded in the suit could not be afforded in so short a time. That relief was threefold. (1) A judgment was sought declaring the Texas Statutes unconstitutional. These statutes have been declared unconstitutional by the Supreme Court of Texas and defendants do not take issue with the averments of the complaint in this regard and nothing is presented for the Court to decide. (2) Plaintiffs prayed that the rights of the parties be declared. There was no controversy between the litigants as to their respective rights. Plaintiffs claimed the right to be admitted to schools without discrimination because of race or color. The defendants freely admitted that right. The only point at issue related to timing. There was no "actual controversy" between the parties, and, therefore, no jurisdiction was conferred on the Court by 28 U.S.C.A. 2201 and Rule 57 F.R.C.P. (3) Injunctions, preliminary and permanent were sought. There was no threat by the defendants to do anything plaintiffs did not want done or to omit doing anything plaintiffs wanted done. Defendants solemnly declared their readiness to admit plaintiffs to schools on an integrated basis when the problem could properly be worked out. The very basis of injunctive relief is threatened

action or failure to act by one party in derogation of established rights of the other party. The rights claimed by the plaintiff are admitted and neither the pleadings nor the proof reflect any threat by the defendants to violate those rights. Therefore, there is no basis for injunctive relief.

> "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law . . . or the final authority of a state court to interpret doubtful regulatory laws of the state. . . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers . . ."[8]

V.

The majority opinion reverses the judgment dismissing the complaint without prejudice and orders the Court below to "afford the parties prompt and full hearing on the issues tendered in their pleadings."[9] To permit judicial proceedings to be in progress while the school authorities are seeking to perform duties defined by the Supreme Court as primary is not only to provide duplication of effort and to bring the two proceedings into inevitable conflict, but it is to cast into confusion a scheme which the Supreme Court spelled out with clarity. Particularly is this true where, as here, it is perfectly plain that the school authorities have not had time to study the complexities of the problem and to come up with the proper answers.

It is not reasonable that the Supreme Court would have placed primary responsibility in a group commissioned to act administratively with the expectation that this group would be hampered or vexed in accomplishing their task, severely difficult at best, by contemporaneous litigation directed towards fashioning a club to be held over their heads. Such a judicial intervention would connote a distrust of the functioning of the preliminary administrative process and would cast those conducting it under a handicap of suspicion so great as to thwart at the threshold the orderly carrying out of the procedures so plainly delineated by the Supreme Court.

Moreover, that course would, in my opinion, contravene the principles and policies so carefully worked out by this Court in Cook v. Davis, *supra*, and the other cases following it; and would repudiate the approval we gave to the action of the trial Court in Davis v. Arn, *supra*, where the complaint had been dismissed as premature, and the language we there used (p. 425):

> "We cannot assume that if plaintiffs had pursued that remedy they would have been denied the relief to which they were en-

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8. Railroad Commission of Texas, et al v. Pullman Company, et al, 1941, 312 U.S. 496, 500-1, and see also Burford v. Sun Oil Co., 319 U.S. 315, 332-3; Reliable Transfer Co. v. Blanchard, 5 Cir., 1944, 145 F.2d 551, 552.

9. Plaintiffs aver in their complaint that they are entitled to have it heard by a three-judge court under 28 U.S.C.A. 2281, et seq., and pray that such a court may be convened. If the hearing ordered by the majority is to be held, it is my opinion that these statutes must be followed, and that any injunction which might possibly be ordered by one judge would be void for want of jurisdiction. The Statute provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under Section 2284 of this title." The complaint specifically avers that the defendants are so acting under state statutes and the language of 2281 fits the situation exactly. Although such practices are much in vogue, I do not share the belief that specific congressional provisions can be repealed or circumvented by judicial fiat.
See Board of Supervisors, etc. v. Tureaud, Oct., 1955, 226 F.2d 714, and my dissents in the same case reported in 225 F.2d at 435, August 23, 1955, and 228 F.2d at 896, Jan. 1956.

titled. The presumption is the other way. *As the complaint does not allege that plaintiffs have availed themselves of the state administrative remedies open to them under the Act, their resort to a federal court to control state officers in the performance of their duties is premature.*" [Emphasis added.]

It is my opinion that it was within the competence of the Court below to dismiss without prejudice this prematurely-brought complaint and that, in doing so, it followed the spirit and letter of the Supreme Court's opinions and also vindicated the true function of the judicial process. I would affirm

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EDUCATION

Public Schools—Texas

Nathaniel JACKSON, a minor, by his father and next friend, W. D. Jackson, et al. v. O. C. RAWDON, as President of the Board of Trustees, Mansfield Independent School District, et al.

United States Court of Appeals, Fifth Circuit, June 28, 1956, Civ. No. 15927.

SUMMARY: Negro school children of the Mansfield Independent School District in Texas brought a class action in federal district court seeking a declaratory judgment and injunctive relief against school officials of that District with respect to their right to be admitted to public schools without regard to race or color. The district court dismissed the action without prejudice, holding that injunctive relief under the circumstances would be "precipitate and without equitable justification." 135 F. Supp. 936, 1 Race Rel. L. Rep. 75 (1955). On appeal the United States Court of Appeals for the Fifth Circuit reversed and remanded, holding that plaintiffs were entitled to a declaration of their right to attend public school without regard to race or color and to a prompt start, "uninfluenced by private and public opinion as to the desirability of desegregation in the community", by the board to effect desegregation of the school.

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

HUTCHESON, Chief Judge.

Brought October 7, 1955, against the defendants, Board of Trustees of the Mansfield Independent School District, the president and members of the board, and the superintendent of the district, by Negro children of school age, to redress the deprivation, under color of state law, of their rights secured by the Constitution of the United States, the suit sought a declaratory judgment and an injunction.

The claim was that, though plaintiffs, minors between the ages of six and twenty-one years, have met all lawful requirements for admission to the Mansfield High School, maintained by the Mansfield Independent School District, the defendants denied them admission thereto because, and only because, they were colored, and there being no Negro high school in the district, they were, pending recognition of their right to attend Mansfield High School, obliged to accept bus service to Fort Worth to attend the Negro high school there.

Defendants filed a motion to dismiss, in which, admitting that the Supreme Court of the United States, in Brown v. Board of Education, 347 U.S. 483, had more than a year earlier determined that state laws and state constitutions which prescribed segregation were unconstitutional, and that the Supreme Court of Texas, on Oct. 12, 1955, in McKinney v. Blankenship, 282 SW(2) 691 had recognized that the decision in that case had had the specific effect of rendering unconstitutional the segregation provisions of the constitution and laws of Texas, and, asserting: that desegregation could not be accomplished overnight; that the problem of desegregation of the public school system of the Mansfield District is under intensive study; that so far they have not had time to adjust to the transition; and that they are making every effort to make such adjustment and will make such adjustment as soon as time and circum-

stances will permit; insisted that the suit was premature and should be dismissed.

For answer, admitting some and denying other paragraphs of the complaint and realleging, as they had in their motions to dismiss, that the defendants are obeying the mandate of the Supreme Courts of the United States and of the State of Texas, in attempting to solve the problem in an equitable manner, defendant urged that the remedy sought by plaintiffs is premature and the suit should be dismissed.

[*Community Reaction*]

Thereafter, the case came on for hearing and was fully heard upon evidence which, consisting in part of testimony as to the substitute arrangements the board had made for sending Negro children to Fort Worth by bus so that they would not have to be admitted to the Mansfield High School, fully established plaintiffs' claims by developing that there were no administrative difficulties which had to be overcome in order to admit the plaintiffs to the Mansfield High School but only, as clearly shown by the testimony of R. L. Huffman, the superintendent, a difficulty arising out of the local climate of opinion,[1] requiring the board, in its opinion, to discriminate against plaintiffs by denying them access to the only high school in Mansfield, while permitting white children to attend it. Cf. Whitmore v. Stilwell, 227 F(2) 188.

In answer to questions as to when the matter of admission of colored students on a desegregated basis in the Mansfield District would likely come about, Huffman stated that the board and each member of it had had discussions with the citizenship of the town, and the board had passed a resolution that the schools would be kept segregated during the year 1955-56.

In answer to further inquiry as to what his contention now is, he stated: "The court ruled we had a reasonable length of time to meet the different requirements, and we would not have time on that short notice, from May 17, 1954 until May of 1955, or between May of 1955 to September 2, 1956, to carry out the mandate of the court".

[*Testimony of Board Members*]

Mr. Gibson, secretary, and a member of the school board, testified that he was on a committee to study segregation and that it was still in operation, and "We are going to try to desegregate as soon as we think it is practicable at all."

> Q: In other words, you are going to desegregate when the tension or the reaction of your community to desegregation will be neutralized?
>
> A: As much as possible.

Asked: "Has your board made any decision at all as to what it is going to do about the year 1956-57?" the witness answered: "No" and that the board had no plan beyond the one already announced for the present session.

Mr. Wilshire, a school board member, testified that the board had reached no conclusion with respect to desegregation.

> Q: Have you run into any problems?
> A: We have.
>
> Q: What are your problems?
> A: Dissatisfaction among the community.
>
> Q: When you say dissatisfaction among the community, what is the community dissatisfied about?

1. Q: Is that your position?
   A: That is right.
   Q: Now what conditions would you have to bring about in order to carry out the court's mandate?
   A: That would be hard to answer in a concise statement due to the fact that we have been in the two fold school system so long in Texas *we just would not have time to enter into the many details that would have to be worked out in order to sell such a program in the local community.*
   Q: What were some of those details?
   A: Well it would be the breaking down of the old traditions that had been established. It would be getting two different types of people ready for something new which the board deems will take time.
   Q: It would be the breaking down of old traditions and getting the people to accept the change?
   A: That is right, getting both sides of a question into a position to accept.
   Q: So that was the barrier that you had, that was the thing that kept you from going ahead, is that correct?
   A: That is one of the main barriers.
   Q: All right, sir, did you have any others?
   A: Well not other than just the fact that we had details to work out in placing these students where they have not been with the whites and the colored and this could not be done we thought just over night.

   His final answer was: the school board if given sufficient time can and will work out the problem to the mutual satisfaction of all the people in the community and when conditions have been made such and justifiable, it will be done.

A: Well, they are not satisfied with desegregation and are not ready to enter into it right at the present time, and we have reported that to the board.

Q: What plan does your board have of conforming to the mandates of the two decisions?

A: I believe if we were given sufficient time we could work the problem out but at the present time we have no plan.

[*Decision Below*]

The testimony ended, the district judge, declining to enter a declaratory judgment as prayed for in pars. (a) (b) (c) and (d) of plaintiff's prayer, declaring and establishing the constitutional rights of plaintiffs, not to be discriminated against, and treating the suit as only for an injunction, held:

"The School Board has shown that it is making a good faith effort toward integration and should have a reasonable length of time to solve its problems and end segregation in the Mansfield Second School District. At this time this suit is precipitate and without equitable justification."

So finding and holding, he ordered the action dismissed without prejudice and plaintiffs have appealed.

Here, citing cases[2] in complete support, appellants insist that the board has not brought itself within the protection of the "prompt and reasonable start" requirements of the Supreme Court. Invoking the settled doctrines: (1) that in a suit of this kind plaintiffs have an absolute right to have their constitutional rights declared; and (2) that the defendants may not, upon consideration of the merely personal viewpoints of the trustees and of the citizens generally, that the community is not psychologically ready for the change, continue the practice of segregation in the high school; they insist that the judgment was wrong, and must be reversed, while appellees vigorously defend the judgment as within the sound discretion of the district judge and right.

[*Prompt Start Necessary*]

We think it clear that, upon the plainest principles governing cases of this kind, the decision appealed from was wrong in refusing to declare the constitutional rights of plantiffs to have the school board, acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration to abolish segregation in Mansfield's only high school and to put into effect desegregation there.

Had the court made such a declaration and retained the cause for further orders necessary to implement it, deferment to a later time of action on the prayer for injunctive relief if necessary, may well have been within his discretion. The issuance of such a declaration of rights with retention of the case would have given the court the means of effectually dispeling the misapprehension of the school authorities as to the nature of their new and profound obligations and compelling their prompt performance of them. This misapprehension appears from the undisputed evidence of superintendent and board members which plainly shows that the board had not given serious consideration to its paramount duty not to delay but to proceed with integration in respect to the sole high school in Mansfield, but, quite to the contrary, had taken definite action to continue segregation there throughout the coming school year. Indeed it had declined to fix or even give serious consideration to the time when it would cease, and the only reason it gave for not instituting it at once in the case of the plaintiffs and the Mansfield High School was its concession to public opinion.

The judgment is, therefore, REVERSED and the cause is REMANDED with instructions for further and not inconsistent proceedings, including instructions to the district court that it declare: that plaintiffs have the right to admission to, and to attend, the Mansfield High School on the same basis as members of the white race; that the refusal of the defendants to admit plaintiffs thereto on account of their race or color is unlawful; that it order the defendants forever restrained from refusing admission thereto to any of the plaintiffs shown to be qualified in all

2. Brown et al v. Bd. of Education, et al, 347 U.S. 483; 349 U.S. 294; Clemens v. Board of Education, 228 F(2) 853; McKinney et al v. Blankenship et al, 282 S.W.(2) 691; Willis v. Walker, 136 F. Supp. 181; to which may be added Whitmore v. Stilwell, 227 F(2) 187.

respects for admission; and that it retain jurisdiction of the cause for further orders at the foot of the decree to promptly, fully, and effectively carry out this mandate and the orders of the district court entered pursuant thereto.

REVERSED and REMANDED with directions.

EDUCATION

School Bonds—North Carolina

R. K. CONSTANTIAN, a Taxpayer of Anson County, on Behalf of Himself and all other Taxpayers of Anson County v. ANSON COUNTY.

Supreme Court of North Carolina, June 6, 1956, 244 N.C. 221, 93 S.E.2d 163.

SUMMARY: A citizen in North Carolina brought a taxpayer's suit to restrain county officials from issuing certain school bonds previously approved by the North Carolina Supreme Court. The plaintiff sought an injunction on the grounds that the bonds were authorized in contemplation of the North Carolina constitutional and statutory provisions requiring racially segregated schools and therefore could not be utilized for non-segregated schools. The North Carolina Supreme Court held that the provisions of the state constitution and statutes setting up a system of state public schools were severable from the invalid provisions requiring mandatory separation of the races and that the bonds could thus be legally issued notwithstanding the invalidity of those provisions.

[STATEMENT OF FACTS BY THE COURT]

Action by plaintiff, a citizen, property owner and taxpayer of Anson County, on behalf of himself and all other taxpayers of said county, to enjoin defendant from issuing and selling $750,000 of capital outlay school bonds.

A bond order adopted 19 May, 1952, by the Board of Commissioners of Anson County, and approved by a majority of the qualified voters of the county in an election held 28 June, 1952, authorized the issuance of $1,250,000 of capital outlay school bonds and the levy of taxes for the payment thereof.

The school plant facilities to be financed by the issuance of said bonds were described in the bond order, in the published notice of election and in the ballot used by the electors, as follows:

"(1) erection of a new elementary school building with gymnasium in Wadesboro, and (2) erection of a new high school building with gymnasium at a suitable location in the northwestern section of the county, and (3) remodeling and reconstruction of existing elementary school buildings, and (4) remodeling and reconstruction of the existing building used for the high school in Wadesboro, and (5) erection of a new building or an addition to an existing building suitable to provide eight rooms for colored children in Wadesboro, and (6) erection of a new building or an addition to an existing building suitable to provide four rooms for colored children in Polkton, and (7) erection of a new building to be used as a teacherage, and (8) acquisition of any land necessary for the erection of such new buildings or additions to existing buildings, and (9) acquisition and installation of the equipment necessary for such new or remodeled or reconstructed buildings or additions to existing buildings."

Defendant has issued $500,000 of said bonds. Of the seven *specific* projects, those designated (1), (3) and (6) have been completed; but those designated (2), (4), (5) and (7) have not been completed. Unless restrained, defendant will issue the remaining $750,000 of said bonds and use the proceeds to provide the uncompleted portion of the school plant facilities so authorized.

From these admitted facts, plaintiff draws legal conclusions, controverted by defendant, upon which he bases his right to injunctive relief. Plaintiff's contentions, as to the applicable law, will be stated in the opinion.

After hearing, the court denied plantiff's application for injunctive relief; and, in accordance with defendant's pleading and prayer for relief, adjudged that "the proposed issuance of the remaining authorized $750,000 of bonds for school plant facilities in Anson County is authorized under law and all such bonds when issued will in all respects be valid obligations of said county."

Plaintiff excepted and appealed, his sole assignment of error being that the court, in signing said judgment, misapplied the law to the facts.

BOBBITT, J. The bond order and the election, authorizing the $1,250,000 issue, were approved by this Court in Parker v. Anson County, 237 N.C. 78, 74 S.E.2d 338. Even so, plaintiff now insists that the bond order was and is void on its face because it discriminates against children of the white race in violation of the Constitution of North Carolina, Article IX, section 2. The sole basis for this contention is that the facilities identified in projects (5) and (6) were described as facilities *suitable for colored children.* This contention is clearly without merit.

Unquestionably, it was contemplated that projects (5) and (6) would make available additional plant facilities wherein only colored children would be taught. It was also contemplated that some or all of the other projects would make available additional plant facilities wherein only white children would be taught. Any other inference would lose touch with reality. The nine projects constituted one complete program, reflecting the judgment and discretion of the school authorities in the three administrative units, designed to provide additional plant facilities for all school children of Anson County.

Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267, and Bonitz v. School Trustees, 154 N.C. 375, 70 S.E. 735, relied on by defendant, rather than Williams v. Bradford, 158 N.C. 36, 73 S.E. 154, relied on by plaintiff, are more nearly in point. However, the authority of these cases need not be invoked as a basis for decision here; for, based upon any reasonable interpretation thereof, the bond order on its face does not show discrimination against children of the white race.

Having reached this conclusion, there is no need to consider whether plaintiff, on principles of *res judicata,* is precluded by the decision in Parker v. Anson County, supra, from now making such contention.

Assuming the original validity of the bonds so authorized, plaintiff contends that, by reason of decisions of the Supreme Court of the United States made subsequent to such authorization, the *purpose* for which the bonds were authorized cannot now be realized. This *purpose,* plaintiff contends, was to finance additional school plant facilities for a public school system wherein the children of the white race and the children of the colored race would be taught in separate schools, the only system then lawful.

[*North Carolina Constitution*]

Sections 2 and 3, Article IX, Constitution of North Carolina, bear directly on the questions presented. Each section is quoted below.

> "Sec. 2. The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race."

As ratified 24 April, 1868, Article IX, section 2, consisted solely of the *first* of the two sentences. The *second* sentence was added by amendment adopted by the Constitutional Convention of 1875, ratified by the people in November, 1876, effective 1 January, 1877. Journal of the Constitutional Convention of 1875; Connor & Cheshire, The Constitution of North Carolina; Elliott v. Board of Equalization, 203 N.C. 749, 166 S.E. 918.

> "Sec. 3. Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the Commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment."

As ratified 24 April, 1868, Article IX, section 3, was as quoted except the words "four months"

then appeared rather than the words "six months." This amendment, submitted by the General Assembly of 1917 (Ch. 192, Public Laws of 1917), became effective upon its ratification by the people in November, 1917. Elliott v. Board of Equalization, *supra.*

These propositions are well established. Article IX, section 2, contains a mandate that the General Assembly provide for a State public school system. Article IX, section 3, contains a mandate that the board of commissioners of each county in the State provide the funds for the buildings and equipment necessary for the maintenance and operation of schools within the county for the constitutional term. Marshburn v. Brown, 210 N.C. 331, 186 S.E. 265. Full responsibility for the administration of school affairs and the instruction of children within each administrative unit, including the assignment of pupils to particular schools, rests upon the school authorities of such unit. Parker v. Anson County, *supra,* and cases cited. In short, when the board of commissioners provides the funds for the necessary buildings and equipment, it has no further responsibility or authority. The school authorities within each administrative unit have full responsibility and authority in respect of the school program.

It was the duty of the Board of Commissioners of Anson County to provide the funds for necessary plant facilities. The bond order set forth in express terms that $1,250,000 was needed for that purpose. The Board of Commissioners and the electorate authorized the bond issue to provide the funds necessary for such additional plant facilities. Nothing appears in this record to suggest that the needs are less in 1956 than in 1952. Indeed, the court below incorporated in the judgment a finding of fact, to which no exception was taken, that "additional school plant facilities for the public school system in Anson County are urgently needed now." When the bonds were authorized, the sole purpose in mind was to provide funds to meet the over-all capital outlay needs in respect of all school children of Anson County, white and colored. The school program, as distinguished from plant facilities, was not in issue or involved.

An entirely different question was presented to this Court in Mauldin v. McAden, 234 N.C. 501, 67 S.E.2d 647, and Gore v. Columbus County, 232 N.C. 636, 61 S.E.2d 890, and Feezor v. Siceloff, 232 N.C. 563, 61 S.E.2d 714, and Waldrop v. Hodges, 230 N.C. 370, 53 S.E.2d 263, and Atkins v. McAden, 229 N.C. 752, 51 S.E.2d 484. In those cases, decision turned on whether subsequent findings in the light of changing educational needs warranted the transfer or reallocation of funds from one project to another within the general purpose (school plant facilities) for which the bonds were authorized. Here there is no suggestion that the funds to be derived from the sale of the unissued bonds ($750,000) are to be transferred or reallocated from one project to another within the general purpose for which the bonds were authorized.

The phrase, *suitable for colored children,* used in connection with projects (5) and (6), connotes nothing beyond the fact that it was then contemplated that these would make available additional plant facilities wherein colored children would be taught. Obviously, physical school plant facilities and equipment are suitable for the teaching of children, irrespective of race or color.

[*Segregation Requirement*]

We come now to the contention upon which plaintiff places major emphasis. It is this: When the bonds were authorized, Article IX, section 2, as construed by this Court, contained the *mandatory requirement* that children of the white race and children of the colored race be taught in separate schools. Puitt v. Commissioners, 94 N.C. 709; Lowery v. School Trustees, *supra.* Moreover, the validity of such mandatory requirement had the sanction of decisions of the Supreme Court of the United States; for, as late as 1927, *Chief Justice Taft,* speaking for a unanimous Court, had explicitly declared that each state had the right and discretion to determine, in respect of its public school system, whether the children of different races should be taught in the same or separate schools, "the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution." Gong Lum v. Rice, 275 U.S. 78, 72 L.Ed. 172, 48 S.Ct. 91. However, in 1954 the Supreme Court of the United States declared that the *enforced* separation of Negroes and whites in public schools *solely on the basis of race* denied to Negroes equal protection of the laws (Brown v. Board of Education of Topeka, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, 38

A.L.R. 2d 1180), and in its 1955 decision applied the proposition so declared to the cases before it (Brown v. Board of Education of Topeka, 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753). The bonds were authorized when it was contemplated that children of the white race and children of the colored race would be taught in separate schools in compliance with Article IX, section 2, and not otherwise. Hence, the argument runs, both the bond order and the election were invalidated by the unprecedented action of the Supreme Court of the United States; for, plaintiff insists, if the school authorities cannot operate the schools in compliance with Article IX, section 2, there is no authority to provide additional school plant facilities when no lawful use thereof can be made for school purposes.

The Fourteenth Amendment to the Constitution of the United States provides, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The limitation is upon the exercise of governmental power by a state or state agency. This is well settled and fundamental.

[*Public Schools Not Mandatory*]

No provision of the Constitution requires that a state maintain a system of public schools, whether attendance be compulsory or voluntary. This is exclusively a matter of state policy. Moreover, in respect of a state public school system, nothing in the Brown case requires that children of different races be taught in the same schools. The doctrine therein declared, to be put into effect in specific cases "with deliberate speed" as conditions may warrant, is that no child, whatever his race, may be excluded from attending the school of his choice solely on the basis of race. If so excluded by the state or a state agency, he may assert his constitutional rights under the equal protection clause of the Fourteenth Amendment as interpreted in the Brown case. In substance, this is the interpretation placed upon the Brown case by the three-judge district court, composed of Parker and Dobie, Circuit Judges, and Timmerman, District Judge, upon rendering their decision 15 July, 1955, in Briggs v. Elliott, 132 F. Supp. 776. No one can now foretell in what localities or in what buildings or to what extent children of the white race and children of the colored race will be taught in the same public schools in North Carolina.

The impact of the decisions in the Brown case, in respect of the *operation* of public schools in Anson County, applies equally to the school plant facilities existent prior to the bond order and election, the school plant facilities provided by the bonds sold ($500,000) and the school plant facilities to be provided by the proceeds from the sale of the unissued portion ($750,000) of the authorized issue of $1,250,000. In this respect, there is nothing distinctive about the uncompleted projects for which the bonds were authorized.

If plaintiff's contention were adopted, all authorized (unissued) bonds for school plant facilities, as well as all previously authorized special tax supplements within administrative units, throughout the State, would be invalidated. Applicable legal principles impel the opposite conclusion.

[*Severability of Provisions*]

The mandate to the General Assembly (Article IX, section 2), and the mandate to the board of commissioners of each county (Article IX, section 3), discussed above, were part and parcel of the original (unamended) Constitution of 1868. These are the constitutional mandates upon which our public school system is based. See, also, Constitution of North Carolina, Article I, section 27; Article IX, sections 1, 4, 5, 8, 9 and 11. It was the amendment of 1875, which provided that, in obeying the original mandates, a specific method was required, namely, that "the children of the white race and the children of the colored race shall be taught in separate public schools." Only that portion of the 1875 amendment which purports to make *mandatory* the *enforced* separation of the races in the public schools is now held violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Otherwise, the mandates of Article IX, sections 2 and 3, remain in full force and effect. The provisions thereof, absent the mandatory requirement of enforced separation, are complete in themselves and capable of enforcement. Their separable and independent status is manifest. They antedate the 1875 amendment. They survive the invalidation of the mandatory requirement of enforced separation contained in the 1875 amendment.

Now as in 1952, Article IX, section 2, is a mandate that the General Assembly provide for

a State public school system. Now as in 1952, Article IX, section 3, is a mandate to the board of commissioners of each county in the State to provide the funds for the buildings and equipment necessary for the maintenance and operation of public schools within the county for the minimum term.

"A statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement." 82 C.J.S., Statutes sec. 92. Our decisions are in accord. R. R. v. Reid, 187 N.C. 320, 121 S.E. 534; Lowery v. School Trustees, *supra*. This well established rule applies equally when a portion of a state constitution or any provision thereof is invalid as violative of the Constitution of the United States.

The final (contradictory) contention of plaintiff is that, assuming that teaching of children of the white race and of the colored race in the same school is now permissible under the decision in the Brown case, the issuance of the bonds ($750,000) is for an unlawful purpose under North Carolina law. The fallacy underlying this contention is that the mandatory requirement as to enforced separation, incorporated in Article IX, section 2, by the 1875 amendment, is no longer the law in North Carolina.

Our deep conviction is that the interpretation now placed on the Fourteenth Amendment, in relation to the right of a state to determine whether children of different races are to be taught in the same or separate public schools, cannot be reconciled with the intent of the framers and ratifiers of the Fourteenth Amendment, the actions of the Congress of the United States and of state legislatures, or the long and consistent judicial interpretation of the Fourteenth Amendment. However that may be the Constitution of the United States takes precedence over the Constitution of North Carolina. Constitution of North Carolina, Article I, sections 3 and 5; Constitution of the United States, Article VI. In the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter. Its decision in the Brown case is the law of the land and will remain so unless reversed or altered by constitutional means. Recognizing fully that its decision is authoritative in this jurisdiction, any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid.

The Florida Supreme Court, in Board of Public Instruction v. State, 75 So.2d 832, and the Supreme Court of Oklahoma, in Matlock v. Board of County Commissioners, 281 P.2d 169, on similar but somewhat variant factual situations, have reached conclusions generally in accord with the decision of this Court.

For the reason stated, the judgment of the court below is

Affirmed.

EDUCATION

School Bonds—North Carolina

Eliza Jane DOBY and J. Lillian Doby v. R. L. BROWN, Jr., etc., Trustees of the Albemarle City Administrative Unit, et al.

United States District Court, Middle District, North Carolina, November 4, 1955, 135 F.Supp. 584.

SUMMARY: The plaintiffs, owners of real property in North Carolina, brought an action for injunction and a declaratory judgment in federal district court seeking to restrain the defendants from proceeding, in a state court action, in a condemnation action against their land. Plaintiffs alleged that the statute authorizing the issuance of school bonds for school construction was enacted prior to the decision of the United States Supreme Court in the *School Segregation Cases* and in contemplation of state laws requiring segregation in the public schools and that the proceeds thereof could not legally be used for schools which might not be segre-

gated. The court dismissed the case on the ground of lack of federal jurisdiction. The Court of Appeals, Fourth Circuit, affirmed (see below).

HAYES, District Judge.

The plaintiffs in their complaint allege that the defendants, school officials of the Albemarle School District, are seeking to condemn a tract of their land to be used as a public school site and on which to erect school buildings. They seek a declaratory judgment and to restrain the defendants from proceeding with the condemnation proceedings pending in the state court. They undertake to establish jurisdiction in this court on the ground of the Fourteenth Amendment and Section 1343 of Title 28 of the U.S. Code Annotated. The matter was heard for a preliminary injunction but at the time of hearing upon the affidavits it was agreed that the case should be disposed of on its merits.

The real essence of the plaintiffs' complaint is a demand for an injunction to restrain the defendants from continuing the condemnation suit pending in the state court. They allege several reasons why the plaintiffs contend that that proceeding should be restrained. This court must determine, first of all, whether it has any jurisdiction to entertain the suit because nothing could be gained by a discussion of the case on its merits unless this court has jurisdiction. If jurisdiction exists under the allegations of the complaint it would have to be based upon Section 1343 of Title 28 U.S.C.A. This statute is commonly referred to as the Civil Rights Statute and has to do with the privileges and immunities of citizens or persons in the United States under, and by virtue of, the laws of the United States. Its history and purposes are fully set forth in Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423. In a well-considered opinion by Judge Chestnut in the case of Norris v. Mayor and City Council of Baltimore, D.C., 78 F.Supp. 451, which is cited and approved by a three-judge court in Reiling v. Lacey, D.C., 93 F.Supp. 462, the jurisdictional questions under Title 28 U.S.C.A. §1343 are exhaustively stated and the conclusion is reached that this section deals only with the deprivation of civil rights as to which the amount in controversy is not essential. If, however, the suit is to enforce a federal right, which is not the deprivation of a civil right, it is necessary that the amount in controversy exceed $3,000 as it does in cases of diversity of citizenship.

It does not appear in the plaintiffs' complaint that their tax liability in the school district, by virtue of the issuance of bonds, amounts to $3,000. The tax of the plaintiffs is the basis for the determination of the amount in controversy and not the value of the property owned by them. Colvin v. City of Jacksonville, 158 U.S. 456, 15 S.Ct. 866, 39 L.Ed. 1053. In the absence of an allegation that the amount of their tax liability under the so-called illegal school bonds would exceed $3,000, this court has no jurisdiction to entertain the cause of action and accordingly the case will be dismissed without prejudice.

[*Basis for Federal Jurisdiction*]

The plaintiff also undertakes to establish jurisdiction in this court by alleging that the value of their land exceeds $3,000 and that the defendants are undertaking to take it away from them by condemnation proceedings in the state court, contrary to the provisions of the Fourteenth Amendment. However, this court is not bound by their allegations of legal conclusions but it is the duty of the court to ascertain whether a bona fide controversy does exist in which this court has the right to take jurisdiction. Robinson v. Anderson, 121 U.S. 522, 7 S.Ct. 1011, 30 L.Ed. 1021, and Defiance Water Co. v. City of Defiance, 191 U.S. 184, 24 S.Ct. 63, 48 L.Ed. 140. General Statutes of N. C. 115-85 et sequor make ample provision for the ascertainment of damages in condemnation proceedings of property for public use and not only provide for the appointment of appraisers but provides for an appeal from the determination to the Superior Court and to a trial before a jury on the value of property being taken. These statutes meet all of the requirements of due process and have been so well and so long determined that it is not necessary to cite any authorities other than Abernathy v. South & W. R. Co., 150 N.C. 97, 63 S.E. 180; City of Oakland v. United States, 9 Cir., 124 F.2d 959, and Hanson Lumber Co. v. United States, 261 U.S. 581, 43 S.Ct. 442, 67 L.Ed. 809. The North Carolina statutes meet the requirements both of just compensation and due process under the Fourteenth Amendment to the United States Constitution.

The condemnation proceedings in the State of North Carolina was a proceeding *in rem* against the specific property. United States v. Burnette, D. C., 103 F.Supp. 645; United States v. 25.936 Acres, 3 Cir., 153 F.2d 277; North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953. The state court acquired jurisdiction of the *rem* in the condemnation proceedings in spite of the dilatory action of the plaintiffs in their efforts to frustrate the state court in obtaining jurisdiction of the *rem* and over the plaintiffs. Toucey v. New York Life Ins. Co., 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100. The history of that delay is set forth in Brown v. Doby, 242 N.C. 462, 87 S.E.2d 921. The plaintiffs unsuccessfully attempted in the state court to restrain the defendants from proceeding with the condemnation suit. Mountain Retreat Ass'n v. Mount Mitchell Development Co., 183 N.C. 43, 110 S.E. 524. Having failed in the state court they filed this suit in effect to restrain the parties from proceeding in the state court.

If the other obstacles heretofore mentioned had been met by the plaintiffs we could not entertain jurisdiction because we are forbidden to do so by Title 28 U.S.C.A. §2283. Defiance Water Co. v. City of Defiance, supra. It is appropriate to quote from the above case as follows [191 U.S. 184, 24 S.Ct. 67]:

> "Litigation in the state courts cannot be dragged into the Federal courts at such a stage and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the grounds that the state courts might so decide as to render their final action unconstitutional."

This court ought not assume jurisdiction in a case of this nature unless clearly compelled to do so, because all the parties are citizens of the State of North Carolina and the issues relate primarily to school authorities and the law of North Carolina. The courts of the state are abundantly capable of determining the rights of all parties in interest. We have no reason to doubt that the state courts will follow the Constitution of the United States and safeguard everyone's rights. Whether the bond election was valid is a question to be determined by the law of North Carolina and the courts of the state are the proper forums in which to do it. Federal judges are ill-prepared to sit in judgment in every school squabble. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 ruled that segregation was discriminatory but it did not require a federal judge to become a substitute for local school boards. The state still operates; it still pays the bills; it still retains control and so long as it does, the federal law will not interfere. The courts of the state are reluctant to interfere with the action of school boards in the performance of their discretionary powers. Key v. Board of Education, 170 N.C. 123, 86 S.E. 1002. Certainly a federal court should not interfere except in cases of undoubted jurisdiction.

EDUCATION
School Bonds—North Carolina

Eliza Jane DOBY and J. Lillian DOBY v. R. L. BROWN, Jr., etc., Trustee of the Albemarle City Administrative Unit, et al.

United States Court of Appeals, Fourth Circuit, April 9, 1956, 232 F.2d 504.

SUMMARY: This case, involving the question whether school bonds voted prior to the *School Segregation Cases* might be used to finance non-segregated school facilities, having been dismissed by the federal district court (see above), was appealed to the Court of Appeals, Fourth Circuit. That court held that the matters asserted were questions for decision by the state courts and that no substantial federal question was involved.

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

PARKER, Chief Judge.

This is an appeal from an order dismissing a suit instituted by landowners to obtain a declaratory judgment as to their rights and to enjoin prosecution of the condemnation proceedings which were before the Supreme Court of

North Carolina in Brown v. Doby, 242 N.C. 462, 87 S.E.2d 921. The District Judge, in addition to holding that the jurisdictional amount was not involved in the case and that interference with an in rem action in a state court was asked, held that no federal question was involved either under the civil rights statute or otherwise and that, even if there were, the case was one of which the federal courts ought not assume jurisdiction, in view of the fact that the question related to the interpretation of a North Carolina statute which could be interpreted by the courts of the state in the pending condemnation proceedings. We find it unnecessary to go into the questions of amount involved or whether the state court had acquired jurisdiction over the property in an in rem proceeding,[1] as we are of opinion that the District Judge was clearly right in holding that no federal question is involved in the case.

[*Effect of Brown Decision*]

In their complaint the plaintiffs say that the condemnation of their land is not authorized because it is being condemned to provide a site for a school which is to be paid for with the proceeds of a bond issue which was authorized by a statute passed prior to the decision of the Supreme Court in the School segregation case, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. The facts with respect to this are that the General Assembly of North Carolina on April 29, 1953, passed a statute, chapter 1162 of the Session Laws of 1953, authorizing the school district of the City of Albemarle in which plaintiffs' land is situate, to call a special bond election for the purpose of issuing bonds in the sum of $1,250,000 to be used in purchasing sites and erecting and equipping school buildings. On April 20, 1954, a special bond election was called pursuant to the statute and was held on June 8, 1954, resulting in a vote in favor of the bonds. On November 20, 1954, the condemnation proceeding was commenced to condemn plaintiffs' land under the general statute authorizing condemnation of land for school purposes, section 115-85 (now 115-125) of the General Statutes of North Carolina. They argue that condemnation of their land may not be had because the statute authorizing the bond issue must be construed as authorizing the proceeds to be used only for the purposes of segregated schools, which may not be lawfully conducted since the segregation decision. It is perfectly clear, however, that the question thus presented is not one arising under the Constitution or laws of the United States but involves merely the interpretation and application of the state statute.

[*Law Settled*]

Brown v. Board of Education, supra, settled the law with respect to segregation in the schools. No party to this case is questioning the law as there laid down; and, if the question were raised, it could not be considered a substantial question in view of the unequivocal holding of the Supreme Court. The questions in the case before us are whether the statute authorizing the bond issue authorized the proceeds thereof to be used for the purposes of a nonsegregated school[2] and, if not, whether this would preclude the condemnation of the property of plaintiffs for school purposes under the general condemnation statute of the state. These are manifestly questions of state law and do not arise under the Constitution, under the civil rights statute or under any other law of the United States. The contention of plaintiffs is, not that what the defendants are doing is authorized by the State of North Carolina in defiance of the Fourteenth Amendment, but that it is not authorized by the state at all. This, however, does not present a controversy arising under the Constitution or laws of the United States. Barney v. City of New York, 193 U.S. 430, 437, 24 S.Ct. 502, 48 L.Ed. 737. The rule here applicable was thus stated by Chief Justice Fuller in Defiance Water Company v. Defiance,

1. At the time of the entry of the judgment appealed from there had been no appeal from the appraisal of the Commissioner which was necessary to vest jurisdiction of a judicial proceeding in the Superior Court. Consequently the condemnation proceedings were in the administrative stage. Burlington City Board of Education v. Allen, 243 N.C. 520, 91 S.E.2d 180.

2. The Supreme Courts of Florida and Oklahoma and a Circuit Court in Virginia have passed upon somewhat similar questions in Board of Public Instruction of Manatee County, Florida, v. State of Florida, Fla., 75 So.2d 832; Matlock v. Board of County Com'rs of Wagoner County, Oklahoma, Okla., 281 P.2d 169; Shelton v. County School Board of Hanover County, not reported. In both the Florida and Oklahoma cases, the bond issues were held valid while a contrary decision was reached in the Virginia case.

191 U.S. 184, 190-191, 24 S.Ct. 63, 66, 48 L.Ed. 140, viz.:

"We have repeatedly held that 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground.' Western Union Telegraph Co. v. Ann Arbor Railroad Co., 178 U.S. 239, 20 S.Ct. 867, 44 L.Ed. 1052; Gold Washing & Water Co. v. Keyes, 96 U.S. 199, 24 L.Ed. 656; Blackburn v. Portland Gold Mining Co., 175 U.S. 571, 20 S.Ct. 222, 44 L.Ed. 276; City of Shreveport v. Cole, 129 U.S. 36, 9 S.Ct. 210, 32 L.Ed. 589; New Orleans v. Benjamin, 153 U.S. 411, 424, 14 S.Ct. 905, 909, 38 L.Ed. 764, 769."

Even if a federal question should be held to be involved in the case, it would arise only in connection with the interpretation of state statutes which could be readily passed upon by the courts of the state in the pending condemnation proceedings, and the District Judge was correct in thinking that the federal court ought not assume jurisdiction to interpret and pass upon the state statutes in advance of their construction by the state courts. Shipman v. Dupre, 339 U.S. 321, 70 S.Ct. 640, 94 L.Ed. 877; American Federation of Labor v. Watson, 327 U.S. 582, 595-599, 66 S.Ct. 761, 90 L.Ed. 873; New Orleans v. Benjamin, 153 U.S. 411, 424, 14 S.Ct. 905, 38 L.Ed. 764; Chicago & Alton R. Co. v. Wiggins Ferry Co., 108 U.S. 18, 24, 1 S.Ct. 614, 27 L.Ed. 636. In so far as the suit asked a declaratory judgment, and plaintiffs' brief in this court asserts that it was instituted under the Declaratory Judgments Act, 28 U.S.C. §2201, it is well settled that the granting of declaratory relief is a matter resting in the sound discretion of the trial judge and that it ought not be exercised to try a case piecemeal or to drag into the federal courts matters properly triable before the courts of the state. Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431, 68 S.Ct. 641, 92 L.Ed. 784; Brillhart v. Excess Ins. Co., 316 U.S. 491, 494-495, 62 S.Ct. 1173, 86 L.Ed. 1620; Manufacturers Casualty Ins. Co. v. Coker, 4 Cir., 219 F.2d 631; Maryland Casualty Co. v. Boyle Const. Co., 4 Cir., 123 F.2d 558; Aetna Casualty & Surety Co. v. Quarles, 4 Cir., 92 F.2d 321.

Affirmed.

EDUCATION

School Bonds—Virginia

COUNTY SCHOOL BOARD OF HANOVER COUNTY v. Samuel W. SHELTON

Supreme Court of Appeals of Virginia, June 18, 1956, No. 4545.

SUMMARY: The plaintiff, as a taxpayer, filed a bill for an injunction in a Virginia state court to restrain the School Board from spending the proceeds of a school bond issue. The plaintiff alleged that the school bonds were authorized by an election, held prior to the decision of the United States Supreme Court in the *School Segregation Cases*, in which the electors authorized the bonds only for use in racially segregated schools; and that the proceeds of the bonds could not therefore be utilized for schools which might not be segregated. The trial court granted the injunction and the School Board appealed to the Virginia Supreme Court of Appeals. That court reversed, holding that the proceeds of the bonds would be used for the purposes for which voted, i.e., "for the construction of school improvements in said County for white and negro school children" and that the decision in the *School Segregation Cases* was not material in deciding the validity of the bond issue.

WHITTLE, Justice.

Samuel W. Shelton, as "a resident, freeholder and tax payer" filed a bill for an injunction in the Circuit Court of Hanover County against the County School Board, in which he sought perpetually to enjoin the Board "from spending the proceeds" from a school bond issue.

The Board filed a demurrer and answer to the bill, and the case was submitted on the pleadings and a stipulation. The final decree overruled the demurrer and granted the relief prayed for, to which we awarded the Board an appeal.

The bill conceded that the proceedings authorizing the bond issue were regular and in accordance with the Virginia statutes, namely, §§ 22-168 to 22-178, inclusive, Code of Virginia, 1950. It was alleged, however, that in view of the law as it then existed and the wording of the ballot, the voters of Hanover County were asked to authorize or deny a bond issue for the construction and improvement of buildings, and the procurement of sites therefor "for segregated, or non-racially mixed public schools; and that by answering the question contained on the aforementioned ballot in the affirmative, a majority of the voters of Hanover County did authorize a bond issue * * * to promote segregated public schools and for that purpose only."

[*Allegations of Complaint*]

Continuing, the bill alleged: "Your complainant is further advised * * * that the County School Board of Hanover County intend to construct on the property sought to be condemned and on the other sites sought to be procured, public school buildings, in which to operate non-segregated, mixed or integrated public schools, such buildings, and the sites therefor, to be paid for from the proceeds of the bond issue authorized July 14, 1953. * * * (A)nd the operation in Hanover County of mixed schools, will be for a purpose other than authorized by the voters of Hanover County on July 14, 1953. Your complainant is advised and so alleges that the County School Board of Hanover County will authorize and conduct only such types of public schools as are permitted by law; and that since some time in May, 1954, segregated, or non-mixed schools have been unlawful. Wherefore, your complainant prays that an injunction be issued restraining the * * * Board * * * from proceeding further * * * and that it be * * * perpetually enjoined from spending the proceeds of the aforementioned bond issue for any purpose other than that for which it was authorized by the voters of Hanover County * * *."

[*Defendants' Answer*]

The demurrer filed by the Board challenged the bill's sufficiency in law, and its answer asserted "that in the election referred to therein held on July 14, 1953, the voters * * * were asked to authorize, or deny, a bond issue for the construction and improvement of buildings and the procurement of sites therefor and for other purposes as set forth in the ballot, to provide adequate facilities for the efficient and lawful operation and maintenance of public schools for white and negro school children in the County of Hanover, and that * * * a majority of the voters * * * did authorize a bond issue * * * for the purpose of providing sufficient facilities for the efficient and lawful operation of public schools * * * for white and negro school children."

When the case was submitted on May 10, 1955, counsel for the Board requested that the record show the following stipulation: That the Board will use funds for any lawful purpose under and pursuant to the laws of Virginia; and that if a representative of the Board were to testify he would state that the Board plans to use the funds from the bond issue for substantially the same buildings and facilities as planned at the time the bond issue was voted. Other statements, not germane to the issue, were also included.

The proceedings authorizing the bond issue were made a part of the record. The official ballot read:

> "Question: Shall Hanover County contract a loan in an amount of One Million ($1,000,000) Dollars and issue bonds therefor in that amount for the purpose of providing funds to supplement State School Construction Funds for the construction of school improvements in said County for white and negro school children, including the purchase of sites for school buildings, or additions to school buildings, the construction of school buildings, or additions

to, or alterations of existing school buildings and the furnishing and equipping of school buildings or additions to school buildings. Said bonds, if authorized, shall run for a period not exceeding twenty years, and shall bear interest at such rate or rates not exceeding six per centum (6%) per annum, as may subsequently be prescribed by the School Board of Hanover County; and to authorize such tax by the Board of Supervisors as shall be sufficient to pay the principal and interest on said bonds as the same nature upon all the property and all persons subject to taxation in said County.

"[For Bond Issue [ ] Against Bond Issue."

On October 20, 1953, after the voters had approved the bond issue, the Circuit Court entered an order directing the School Board and the Board of Supervisors of the County to "proceed at their next respective meetings, or as soon thereafter as they may be advised, to carry out the wishes of the voters as expressed at said election, and to authorize the issuance of * * * bonds for the purposes as set forth in the order of this Court entered on 27 June, 1953, and in the official ballot of the aforesaid election." The purposes expressed in the order and those in the ballot were identical.

[*Judgment Below*]

The decree appealed from quotes the official ballot and states "that on July 14, 1953, an election was held pursuant to the above order with the result that a majority of the electorate of Hanover County voted in the affirmative; that by voting in the affirmative on the aforementioned question, the voters of Hanover County authorized a bond issue for the purpose of providing funds for segregated schools; that as a result of a decision of the Supreme Court of the United States in Brown v. Board of Education of Topeka, et al., 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, (1954), the operation of racially segregated schools is now unconstitutional and illegal; that as a result of the aforementioned decision of the Supreme Court of the United States any money which the County School Board of Hanover County now expends from the proceeds from the sale of said bonds for the construction of new school buildings, or for additions to, or alterations of existing school buildings, or for the furnishing and equipping of school buildings, will now be for a purpose other than that authorized by the voters of this County. The Court doth accordingly adjudge, order and decree that the defendant herein, The County School Board * * * be, and it is hereby perpetually enjoined from spending the proceeds from the aforementioned bond issue for the purpose of constructing school improvements, for purchasing sites for school buildings, or additions thereto, for making additions to, or alterations in existing school buildings, or for the furnishing and equipping of school buildings, or additions thereto, or for any other purpose, whether the proceeds from said bond issue now be in the hands of the defendant or be hereafter received by the defendant. The Court doth further adjudge, order and decree that the defendant herein be, and it is hereby perpetually enjoined from selling any bonds authorized by the aforementioned election of July 14, 1953, which remained unsold on May 13, 1955."

The Board's assignment of error which controls our disposition of the case reads: Does the effect of the ruling of the Supreme Court of the United States in the case of Brown v. Board of Education of Topeka, et al., 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954), so change the purposes for which the school bonds were voted on July 14, 1953, in Hanover County, as to invalidate such bond issue?" In our view this question must be answered in the negative.

[*Purpose of Bonds*]

The qualified electors voted the bonds in this instance "for the purpose of providing funds * * * for the construction of school improvements in said County for white and negro school children, including the purchase of sites for school buildings or additions to school buildings, the construction of school buildings, or additions to, or alterations of existing school buildings, and the furnishing and equipping of school buildings, or additions to school buildings."

Shelton does not question the *bona fides* of the School Board. He concedes that the Board will use the money for the purposes stated in the ballot and contained in the court order approving the bond issue. His contention is that when the electorate voted on the question submitted,

under the Virginia Constitution (§140)[1] the only public schools lawful in Virginia were segregated schools, and that since the United States Supreme Court, by the decision in the Brown case, has made such [segregated] schools "unlawful", the proceeds from the bonds will, of necessity, be used for integrated public schools which were unlawful at the time of the election.

It is axiomatic that the proceeds from a bond issue cannot be used for purposes other than those substantially authorized. However, the record discloses that Hanover County was in desperate need of school improvements and in order to remdy the situation the bonds in question were voted. It being conceded that the proceeds from the bonds will be used for the purposes stated, the expenditure thereof becomes an administrative duty of the Board which neither the lower court nor this court has the right to interfere with. Therefore, the cited opinion of the Supreme Court is beside the point, and, irrespective of our views regarding the decision, it has no place in the determination of the question before us. Board of Public instruction v. State, (Florida), 75 So.2d 832; Matlock v. Board of County Commissioners.—Okla. —, 281 P.2d 169; State of Florida. et al v. Special Tax School District No. 1 of Dade County, Florida, (Florida), 86 So.2d 419.

The decree is reversed and the bill dismissed.

1. "§140. Mixed schools prohibited.—White and colored children shall not be taught in the same school."

TRANSPORTATION

Buses—Alabama

Aurelia S. BROWDER et al. v. W. A. GAYLE, etc.,

United States District Court, Middle District, Alabama, June 5, 1956, No. 1147.

SUMMARY: Negro citizens in Montgomery, Alabama, brought a class action in federal district court against state and city officials, the company operating local buses in the city, and certain of its bus drivers, seeking a declaratory judgment and an injunction. The plaintiffs asked that the defendants' enforcement of state laws and city ordinances requiring racial segregation on the city bus lines be declared in violation of the United States Constitution and enjoined. Jurisdiction of the suit was assumed by the three-judge federal district court. The court, one judge dissenting, held that such segregation violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the doctrine of separate-but-equal as applied to public transportation in *Plessy v. Ferguson* having been impliedly overruled. The court later issued a permanent injunction but provided for its suspension

Before RIVES, Circuit Judge, and LYNNE and JOHNSTON, District Judges.

RIVES, Circuit Judge.

The purpose of this action is to test the constitutionality of both the statutes of the State of Alabama[1] and the ordinances of the City of

1. Title 48, §301 (31a, b, c), Code of Alabama of 1940, as amended, which provide:

"Sec. 301 (31a). Separate accommodations for white and colored races.—All passenger stations in this state operated by any motor transportation company shall have separate waiting rooms or space and separate ticket windows for the white and colored races, but such accommodations for the races shall be equal. All motor transportation companies or operators of vehicles carrying passengers for hire in this state, whether intrastate or interstate passengers, shall at all times provide equal but separate accommodations on each vehicle for the white and colored races. The conductor or agent of the motor transportation company in charge of any vehicle is authorized and required to assign each passenger to the division of the vehicle designated for the race to which the passenger belongs; and, if the passenger refuses to occupy the division to which he is assigned, the conductor or agent may refuse to carry the passenger on the vehicle; and, for such refusal, neither the conductor or agent of the motor transportation company nor the motor transportation company shall be liable in damages. Any motor transportation company or person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than five hundred dollars for each offense; and each day's violation of this section shall constitute a separate offense.

"The provisions of this section shall be administered and enforced by the Alabama public service commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered

Montgomery[2] which require the segregation of the white and colored races on the motor buses of the Montgomery City Lines, Inc., a common carrier of passengers in said City and its police jurisdiction.

The plaintiffs are four Negro citizens who bring this action for themselves and on behalf of all other Negroes similarly situated.[3] The defendants are the members of the Board of Commissioners and the Chief of Police of the City of Montgomery, the members of the Alabama Public Service Commission, The Montgomery City Lines, Inc., and two of its employee drivers.

Each of the four named plaintiffs has either been required by a bus driver or by the police to comply with said segregation laws or has been arrested and find for her refusal so to do. The plaintiffs, along with most other Negro citizens of the City of Montgomery, have since December 5, 1955, and up to the present time, refrained from making use of the transportation facilities provided by Montgomery City Lines, Inc. Plaintiffs and other Negroes desire and intend to resume the use of said buses if and when they can do so on a non-segregated basis without fear of arrest.

The members of the Board of Commissioners and the Chief of Police of the City of Montgomery in their answers to the complaint admit "that they seek to enforce the statutes of the State of Alabama and the ordinances of the City of Montgomery, Alabama", and further aver that "segregation of privately owned buses within cities within the State of Alabama is in accordance with the laws of the State of Alabama and the City of Montgomery."

[*Deny Jurisdiction*]

The members of the Alabama Public Service Commission deny that they, in their official capacities as such members have any jurisdiction over, or have issued any orders relating to the separation of the races on buses operated wholly within the City of Montgomery and its police jurisdiction. On information and belief

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and enforced. (1945, p. 731, appvd. July 6, 1945.)

"Sec. 301 (31b). Operators of passenger stations and carriers authorized to segregate white and colored races.—All passenger stations in this state operated by or for the use of any motor transportation company shall be authorized to provide separate waiting rooms, facilities, or space, or separate ticket windows, for the white and colored races but such accommodations for the races shall be equal. All motor transportation companies and operators of vehicles, carrying passengers for hire in this state, whether intrastate or interstate passengers, are authorized and empowered to provide separate accommodations on each vehicle for the white and colored races. Any officer or agent of such motor transportation company or operator, in charge of any vehicle, is authorized to assign or reassign each passenger or person to a division, section or seat on the vehicle designated by such company or operator, or by such officer or agent, for the race to which the passenger or person belongs; and if the passenger or person refuses to occupy the division, section or seat to which he is so assigned, such officer or agent may refuse further to carry the passenger on the vehicle. For such refusal neither the officer nor agent, nor the transportation company, nor operator, shall be liable in damages. (1947, p. 40, §1, appvd. July 18, 1947.)

"Sec. 301 (31c). Failure to comply with rules and regulations as to segregation of white and colored races.—It shall be unlawful for any person willfully to refuse or fail to comply with any reasonable rule, regulation, or directive of any operator of a passenger station in this state operated by or for the use of any such motor transportation company, or of any authorized officer or agent of such operator, providing separate waiting rooms, facilities, or space, or separate ticket windows, for white and colored races; or willfully to refuse or fail to comply with any reasonable assignment or reassignment by any officer or agent in charge of any vehicle of any such motor transportation company or of any operator of vehicles carrying passengers for hire, of any passenger or person to a division, section, or seat on such vehicle designated by such officer or agent for the race to which such passenger or person belongs; any person so refusing or failing to comply with any such reasonable rule, regulation, or assignment, as aforesaid, shall be guilty of a misdemeanor and upon conviction shall be fined not more than $500.00 for such offense. (1947, p. 40, §2, appvd. July 18, 1947.)"

2. Section 10, Chapter 6, Code of the City of Montgomery, 1952, which provides:

"Every person operating a bus line in the city shall provide equal but separate accommodations for white people and negroes on his buses, by requiring the employees in charge thereof to assign passengers seats on the vehicles under their charge in such manner as to separate the white people from the negroes, where there are both white and negroes on the same car; provided, however, that negro nurses having in charge white children or sick or infirm white persons, may be assigned seats among white people.

"Nothing in this section shall be construed as prohibiting the operators of such bus lines from separating the races by means of separate vehicles if they see fit."

Section 11 of Chapter 6, Montgomery City Code of 1952, further provides:

"Any employee in charge of a bus operated in the city shall have the powers of a police officer of the city while in actual charge of any bus, for the purpose of carrying out the provisions of the preceding section, and it shall be unlawful for any passenger to refuse or fail to take a seat among those assigned to the race to which he belongs, at the request of any such employee in charge, if there is such a seat vacant."

3. Rule 23(a), F.R.C.P.

they allege that the members of the Board of Commissioners and the Chief of Police of said City "have sought to enforce by legal means constitutional and valid statutes and ordinances providing for separate but equal seating arrangements on buses operated in the City of Montgomery, Alabama, and its police jurisdiction".

The Montgomery City Lines, Inc., admits that it has operated, and pursuant to orders of a State Court, continues to operate "its buses as required by the Statutes and Ordinances set out in the Complaint requiring it to provide equal but separate accommodations for the white and colored races". Without dispute the evidence is to the effect that, other than being separate, such accommodations are equal.

The defendants, Blake and Cleere, admit they are employees of the Montgomery City Lines and drivers of its buses, that as such they have acted pursuant to orders of said Company which "has operated its buses on the basis of racial segregation as required by said statutes and ordinances". They deny that as drivers of said buses they are exercising the powers of police officers in the enforcement of said statutes and ordinances.

The complaint prays for the convening of a three-judge district court as provided by Title 28 of the United States Code, §2284; for a declaratory judgment as to whether the enforcement of said statutes and ordinances abridges the privileges and immunities of plaintiffs as citizens of the United States, or deprives them of liberty without due process of law, or denies to them the equal protection of the laws, as secured by the Fourteenth Amendment to the Constitution of the United States,[4] and the rights and privileges secured to them by Title 42, United States Code, §§1981 and 1983.[5] The complaint further prays that the defendants be both temporarily and permanently enjoined from enforcing the statutes and ordinances claimed to be unconstitutional and in conflict with said Federal statutes.

FEDERAL JURISDICTION

Federal jurisdiction is invoked under Title 28, United States Code, §§1331 and 1343(3),[6] and under Title 42, United States Code, §§1981 and 1983, footnote 5, supra. We think that the validity of both the State statutes and the City ordinances is in question, but if only the City ordinance are involved, Federal jurisdiction would still exist because the Constitution and statutes of Alabama authorize the adoption of City ordinances "not inconsistent with the laws of the State",[7] and because the constitutional phrase "equal protection of the laws" refers to City ordinances adopted under State authority as well as to State statutes.[8]

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4. Fourteenth Amendment, §1:
"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. "Section 1981. Equal rights under the law.
"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."
"Section 1893. Civil action for deprivation of rights.
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

6. "Section 1331. Federal question; amount in controversy.
"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."
"Section 1343. Civil rights.
"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
* * *
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

7. Constitution of Alabama of 1901, §89; Alabama Code of 1940, Title 37, §455.

8. Buchanan v. Warley, 245 U.S. 60; Cf. 42 U.S.C.A. 1983; Carlson v. People of California, 310 U.S. 106; Lovell v. City of Griffin, 303 U.S. 444; North American Cold Storage Co. v. Chicago, 211 U.S. 306; El Paso v. Texas Cities Gas Co., 5th Cir., 100 F.2d 501.

JURISDICTION OF THREE JUDGE DISTRICT COURT

A three judge district court is required for the granting of "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State". 22 U.S.C.A. 2281. According to the complaint and the answers, the separation of the races on the buses is required both by State statutes and by City ordinances. Admittedly, therefore, State statutes are involved. The defendants claim, however, that the statutes and ordinances are being enforced by municipal officers only, and not by "any officer of such State". 28 U.S.C.A. 2281, supra.

If the members of the Alabama Public Service Commission are proper parties defendant, a matter to be hereinafter discussed, then it must be conceded that the objection to the jurisdiction of the three judge district court fails. Irrespective of the answer to that question, however, we think that the three judge district court has jurisdiction.

The State statutes, footnote 1, supra, vest in the defendant bus drivers the authority to enforce, and, notwithstanding their insistence to the contrary, we think that when so engaged the bus drivers clearly are officers of the State.

The City Commissioners have important duties to perform in connection with the enforcement, operation, and execution of State statutes. Under Alabama law, a municipal corporation "is essentially a public agency, a local unit of government, invested with a portion of the sovereign power of the State, for the benefit of its inhabitants." Cooper v. Town of Valley Head, 212 Ala. 125; 101 So. 874, 875. The defendant Chief of Police has authority to make arrests for violations of State statutes, 1940 Code of Alabama, Title 15, §152. The City Recorder in criminal cases has the power of an ex-officio justice of the peace. 1940 Code of Alabama, Title 37, §585. All of the City officials admit in their answers that they are enforcing the State statutes. An official, though localized by his geographic activities and the mode of his selection, is performing a State function when he enforces a statute which "embodies a policy of statewide concern."[9]

Very clearly, the three judge district court has jurisdiction.[10]

COMITY

The defendants, relying on Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341, insist that even if the Federal court has jurisdiction, it should, in its discretion as a court of equity, and for reasons of comity, decline to exercise such jurisdiction until the State courts have ruled on the construction and validity of the statutes and ordinances. The short answer is that the doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts.[11]

PARTIES

Without repeating the averments of the complaint we hold that they are clearly sufficient to constitute this a class action on behalf of the four individual plaintiffs and of all other Negro citizens similarly situated. See Rule 23(a), F.R.C.P.

It was probably not necessary for the plaintiffs to sue the members of the Board of Commissioners and the Chief of Police, not only as such but also individually, when no relief is sought against them by way of damages. If, however, the plaintiffs' contentions are sustained, these defendants are acting not only in their capacities as municipal officers, but also as officers of the State; and, further, are possibly transcending the scope of their office in any capacity when they compel obedience to statutes and ordinances attacked as unconstitutional. Moreover, in issuing and enforcing an injunction, a court of equity acts in personam. If, as we trust will be true, no relief becomes neces-

9. Spielman Motor Sales Co. v. Dodge, 295 U.S. 89; Rorick v. Commissioners, 307 U.S. 208, 212; Cleveland v. United States, 323 U.S. 329, 332; Watch Tower Bible & Tract Society v. Bristol, D.Ct. Conn., 24 F.S. 57, affirmed 305 U.S. 572; Suncrest Lumber Co. v. N.C. Park Commission, 4th Cir., 29 F.2d 823.

10. If, however, the proceedings were not such as to require the presence of three judges, the judgment would still be valid as the act of the court of one judge, since that judge concurs and joins in the rendition of the judgment. Commission v. Brasher Lines, 312 U.S. 621, 626; O'Malley v. U.S., 8th Cir., 128 F.2d 676, 687.

11. Lane v. Wilson, 307 U.S. 268, 274; Mitchell v. Wright, 5th Cir., 154 F.2d 924, 926; Romero v. Weakley, 9th Cir., 226 F.2d 399, 402; Wilson v. Beebe, Dis. Ct. Del., 99 F.S. 418, 420. Cf. Doud v. Hodge, 350 U.S. 485, 487.

sary against any of them in their individual capacities, their joinder as individuals will prove harmless. The motion to strike said parties in their individual capacities is therefore denied.

The members of the Alabama Public Service Commission object to their joinder as parties defendant and move to dismiss the action as against them because they say that neither they nor the Commission have any jurisdiction over the buses which are being operated within the City of Montgomery and its police jurisdiction.[12]

In the Act approved July 6, 1945, General Acts of Alabama 1945, p. 731, now carried into the pocket supplement of the 1940 Code of Alabama as Title 48, §301(31a), see footnote 1, supra, appears the following significant paragraph: "The provisions of this section shall be administered and enforced by the Alabama Public Service Commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered and enforced."

Testifying as a witness, the President of the Alabama Public Service Commission admitted that on April 24, 1956, he sent a telegram to the National City Lines of Chicago, of which the Montgomery City Lines, Inc., is a subsidiary, reading as follows:

> "As President of the Alabama Public Service Commission, elected by the people of Alabama, sworn to uphold the segregation laws of this state, which include all forms of public transportation, I hereby defy ruling handed down by the United States Supreme Court ordering desegregation on public carriers. Alabama state law requiring segregation of the races on buses still stands. All public carriers in Alabama are hereby directed to strictly adhere to all present existing segregation laws in our state or suffer the consequences.
>
> /s/ C.C. (Jack) Owen, President
> Alabama Public Service"

That telegram was sent without the knowledge or concurrence of the other two Commissioners.

Since the 1945 Act expressly imposes on the Alabama Public Service Commission the duty of administering and enforcing its requirements as to segregation of the races, and since the President of the Commission has acted so positively and affirmatively to that end, the motion to dismiss the action as against the members of the Alabama Public Service Commission should be and the same is hereby denied.[13]

VALIDITY OF SEPARATE BUT EQUAL DOCTRINE AS APPLIED TO INTRASTATE TRANSPORTATION

The ultimate question is whether the statutes and ordinances requiring the segregation of the white and colored races on the common carrier motor buses in the City of Montgomery and its police jurisdiction are unconstitutional and invalid. Unless prohibited by the Constitution of the United States, the power to require such segregation is reserved to the States or to the people.—See Tenth Amendment.

In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3. Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment.

There is, however, a difference, a constitutional difference, between voluntary adherence to custom and the perpetuation and enforcement of that custom by law. Shelley v. Kraemer, 334 U.S. 1, 13. The Fourteenth Amendment provides that "No State shall * * * deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Those provisions do not interfere with the police power of the States so long as the state laws operate alike upon all persons and property similarly situated. Barbier v. Connolly, 113 U.S. 27, 31, 32. That Amendment "merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Marchant v. Penn. Railroad, 153 U.S. 380, 390. The equal protection clause requires equality of treatment before the law for all persons without regard to race or color. See *e.g.* Strauder v.

12. Compare Code of Alabama 1940, Title 48, §239 with §2 of the Alabama Motor Carrier Act of 1939 carried into the pocket supplement of the Alabama Code as Title 48, §301(2).

13. If, in law and fact, the Commission has no jurisdiction over the operation of the buses here involved, the retention of the members of the Commission as parties defendant will be harmless to them, even if erroneous.

West Virginia, 100 U.S. 303; Buchanan v. Warley, 245 U.S. 60; Gong Lum v. Rice, 275 U.S. 78; Shelley v. Kraemer, 334 U.S. 1.

In Plessy v. Ferguson, 163 U.S. 537, decided in 1896, the Supreme Court held as to intrastate commerce that a Louisiana statute requiring railway companies to provide equal but separate accommodations for the white and colored races was not in conflict with the provisions of the Fourteenth Amendment. That holding was repeatedly followed in later cases. Chesapeake and Ohio Ry. Co. v. Kentucky, 179 U.S. 388 (1900); Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71 (1910); McCabe v. A.T. & S.F. Ry. Co., 235 U.S. 151 (1914).

In Morgan v. Virginia, 328 U.S. 373 (1946), the Court held that a state statute requiring segregated seats for Negro passengers on interstate buses was an unconstitutional burden on interstate commerce. In Henderson v. United States, 339 U.S. 816 (1950) the Court held that interstate railroad regulations and practices assigning a separate table in a dining car to Negroes contravened the Interstate Commerce Act. The Court referred to the statutory right as "a fundamental right of equality of treatment", and cited cases construing the Fourteenth Amendment, see 339 U.S. 825, though the Court did not reach the constitutional question. The reasoning applied was similar to that employed in Shelley v. Kraemer, 324 U.S. 1, 22, where the Court recognized that the underlying philosophy of the Fourteenth Amendment is the equality before the law of each individual.

[*College Education*]

In the field of college education, beginning in 1938 and continuing to the present time, the Court has first weakened the vitality of, and has then destroyed, the separate but equal concept. Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents of Univ. of Oklahoma, 332 U.S. 631 (1948); Fisher v. Hurst, 333 U.S. 147 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Hawkins v. Board of Control of University of Florida, 347 U.S. 971 (1954); Tureaud v. Board of Supervisors of L.S.U., 347 U.S. 971 (1954); Lucy v. Adams, 350 U.S. 1 (1955); Florida ex rel Hawkins v. The Board of Control, 350 U.S. 413; Board of Trustees of the Universtity of N.C. v. Frasier, 350 U.S. 979 (1956).

The separate but equal concept had its birth prior to the adoption of the Fourteenth Amendment in the decision of a Massachusetts State court relating to public schools. Roberts v. City of Boston, 59 Mass. (5 Cush) 198 (1849). The doctrine of that case was followed in Plessy v. Ferguson, *supra*. In the School Segregation Cases, Brown v. Board of Education, 347 U.S. 483 (1954) and Bolling v. Sharpe, 347 U.S. 497 (1954) the separate but equal doctrine was repudiated in the area where it first developed, i.e., in the field of public education. On the same day the Supreme Court made clear that its ruling was not limited to that field when it remanded "for consideration in the light of the Segregation Cases * * * and conditions that now prevail" a case involving the rights of Negroes to use the recreational facilities of city parks. Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954).

Later the Fourth Circuit expressly repudiated the separate but equal doctrine as applied to recreational centers. Dawson v. Mayor and City of Baltimore, 4th Cir., 220 F.2d 386, 387. Its judgment was affirmed by the Supreme Court, 350 U.S. 877. The doctrine has further been repudiated in holdings that the cities of Atlanta and of Miami cannot meet the test by furnishing the facilities of their municipal golf courses to Negroes on a segregated basis. Rice v. Arnold, 340 U.S. 848; Holmes v. City of Atlanta, 350 U.S. 879.

Even a statute can be repealed by implication. A fortiori, a judicial decision, which is simply evidence of the law and not the law itself, may be so impaired by later decisions as no longer to furnish any reliable evidence.[14]

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14. This principle is aptly illustrated by the difference with which the Fourth Circuit treated Plessy v. Ferguson as a binding precedent in 1950, Boyer v. Garrett, 183 F.2d 582 and in 1955, Flemming v. South Carolina Electric & Gas Co., 224 F.2d 752. In their change of views that distinguished Court headed by Chief Judge Parker was governed by the rule best stated by Judge Parker himself, speaking for a three judge district court in Barnette v. West Virginia State Board of Education, 47 F.S. 251, 252-3:

"Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court

We cannot in good conscience perform our duty as judges by blindly following the precedent of Plessy v. Ferguson, *supra*, when our study leaves us in complete agreement with the Fourth Circuit's opinion[15] in Flemming v. South Carolina Electric and Gas Co., 224 F.2d 752, appeal dismissed April 24, 1956, —— U.S. ——, that the separate but equal doctrine can no longer be safely followed as a correct statement of the law. In fact, we think that Plessy v. Ferguson has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation within the City of Montgomery and its police jurisdiction. The application of that doctrine cannot be justified as a proper execution of the state police power.[16]

[*Violate Due Process*]

We hold that the statutes and ordinances requiring segregation of the white and colored races on the motor buses of a common carrier of passengers in the City of Montgomery and its police jurisdiction violate the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States. This holding does not, however, become effective until the entry of formal judgment. The parties are requested to submit to the Court in writing within two weeks from the date of this opinion their views as to the form of judgment to be entered, and as to whether such judgment should be stayed in the event of an appeal.

[*Dissent*]

LYNNE, District Judge, dissenting:

Only a profound, philosophical disagreement with the ultimate conclusion of the majority "that the separate but equal doctrine can no longer be safely followed as a correct statement of the law" would prompt this, my first dissent. But I should consider myself recreant both to conscience and duty in withholding my views because of the affection and esteem which I bear for my associates.

For many years as a trial judge in the state and federal systems I have endeavored faithfully to understand and apply precedents established by the opinions of appellate courts. This was not a blind obedience to a legalistic formula embodied in the rule of stare decisis. It was the result of a simple belief that the laws which regulate the conduct, the affairs, and sometimes the emotions of our people should evidence not only the appearance but also the spirit of stability.

Judges of trial courts frequently find themselves in disagreement with the rationale of an old, but clearly controlling precedent. That is

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who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in Jones v. City of Opelika, 316 U.S. 584, 62 S. Ct. 1231, 1251, 86 L. Ed. 1691. The majority of the court in Jones v. City of Opelika, moreover, thought it worth while to distinguish the decision in the Gobitis case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."

To like effect is the opinion of Judge Frank for the Second Circuit in Perkins v. Endicott Johnson Corporation, 128 F.2d 208, 217-218:

"We would stultify ourselves and unnecessarily burden the Supreme Court if—adhering to the dogma, obviously fictional to any reader of its history, that alterations in that court's principles of decision never occur unless recorded in explicit statements that earlier decisions are overruled—we stubbornly and literally followed decisions which have been, but not too ostentatiously, modified. 'The life of the law,' as Mr. Justice Holmes said, 'has been experience.' Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." See also United States v. Girouard, 1st Cir., 149 F.2d 760, 765, dissenting opinion of Judge Woodbury, reversed 328 U.S. 6; New Eng. Mutl. Life Ins. Co. v. Welch, 1st Cir., 153 F.2d 260, 262; Picard v. United Aircraft Corp., 128 F.S. 632, 636; opinion by Judge Learned Hand; Spector Motor Service v. Walsh, 2nd Cir., 139 F.S. 809, 814, opinion by Circuit Judge Clark; Gardella v. Chandler, 2nd Cir., 172 F.2d 402, 409; United States v. Ullmann, 2d Cir., 221 F.2d 760, 762; "The Attitude of Lower Courts to Changing Precedents", 50 Yale L.J. 1448.

15. That opinion is entitled to great respect, especially in view of the distinction and learning of the judges who compose that Court, Circuit Judges Parker, Soper and Dobie.

16. Shelley vs. Kraemer, 334 U.S. 1, 21; Morgan vs. Virginia, 328 U.S. 373, 380; Buchanan vs. Warley, 245 U.S. 60, 74; City of Birmingham vs. Monk, 5th Cir., 185 F.2d 859, 862.

so because their positions do not insulate them from those changing physical and metaphysical concepts which form a part of the life process. But they are neither designed nor equipped to perform the legislative function of putting off the old and putting on the new. To arrogate to themselves this prerogative, in my humble opinion, would be the first, fatal step in making hollow the proud boast that ours is a "government of laws and not of men."

Judge Rives, just the other day, delivering the opinion of the Court of Appeals for the Fifth Circuit, sitting on bench, in Howard v. United States, —— F.2d —— (April 20, 1956), stated my position, clearly and concisely:

> "In the face of such recognition by the Supreme Court of a test of criminal responsibility, we do not feel at liberty to consider and decide whether in our opinion the recent modification of such test in the District of Columbia is sound or unsound, nor whether some other test should be adopted. *This Circuit follows the law as stated by the Supreme Court and leaves any need for modification thereof to that court, ...*" (Emphasis supplied.)

The majority recognize, it was conceded in oral arguments by counsel for plaintiffs, that Plessy v. Ferguson, 163 U.S. 537 (1896) is precisely in point, and that its holding has been repeatedly followed in later transportation cases.[1] Its authority obviously was unaffected by the action of the Supreme Court in dismissing the appeal in South Carolina Electric & Gas Co. v. Flemming, —— U.S. ——, 24 L.W. 3280. The citation of Slaker v. O'Connor, 278 U.S. 188, is convincing that it did not place the stamp of its approval upon the decision of the Fourth Circuit in Flemming v. South Carolina Electric & Gas Co., 224 F.2d 752, but simply concluded that its judgment was not final and hence that the appeal did not lie. 28 U.S.C.A. 1254(2).

In complete agreement with the Fourth Circuit's opinion in Flemming that the separate but equal doctrine can no longer be safely followed as a correct statement of the law, the majority conclude that Plessy v. Ferguson, in which that doctrine made its first appearance sixty years ago, has been impliedly, though not explicitly overruled. While I share their great respect for Judges Parker, Soper and Dobie, I do not at all agree.

A comparatively new principle of pernicious implications has found its way into our jurisprudence.[2] Lower courts may feel free to disregard the precise precedent of a Supreme Court opinion if they perceive a "pronounced new doctrinal trend" in its later decisions which would influence a cautious judge to prophesy that in due time and in a proper case such established precedent will be overturned explicitly. Peculiarly appropriate in this context is the following language of Judge Woodbury, writing for the First Circuit in New England Mutual Life Ins. Co. v. Welch, 153 F.2d 260, 262:

> "Furthermore we find no indication from anything said therein of a purpose to depart from the rule of the earlier decisions cited above. Under these circumstances we see no occasion even to consider the basic question whether we would adopt the doctrine of Barnette v. West Virginia State Board of Education, D.C. 47 F.Supp. 251, 253, and Spector Motor Service v. Walsh, 2 Cir., 139 F.2d 809, 817, 823, and in extraordinary situations disregard controlling decisions of the Supreme Court not yet explicitly overruled. It will suffice to say that we would feel disposed to consider taking such a course only when there are the clearest indications that the controlling decisions of the Supreme Court, though not formally overruled, would no longer be followed by that Court and we find no such indications here."

In 1950, the Fourth Circuit had before it the case of Boyer, et al v. Garrett, et al, 183 F.2d 582, involving an officially adopted rule providing for the segregation of races in athletic activities in the public parks and playgrounds in the City of Baltimore. In affirming the judgment of the District Court, the same judges who decided Flemming held:

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1. Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U.S. 388 (1900); Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71 (1910); McCabe v. A.T. & S.F. Ry. Co., 235 U.S. 151 (1914).

2. Barnette v. West Virginia State Board of Education, 47 F. Supp. 251 (1942); Perkins v. Endicott Johnson Corporation, 128 F.2d 208 (1942); Spector Motor Service v. Walsh, 139 F.2d 809 (1943); Gardella v. Chandler, 172 F.2d 402, 409 (1949); United States v. Ullmann, 221 F.2d 760 (1955); United States v. Girouard, 149 F.2d 760 (1945); 50 Yale Law Journal 1448.

"The contention of plaintiffs is that, notwithstanding this equality of treatment, the rule providing for segregation is violative of the provisions of the federal Constitution. The District Court dismissed the complaint on the authority of Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256; and the principal argument made on appeal is that the authority of Plessy v. Ferguson has been so weakened by subsequent decisions that we should no longer consider it as binding. We do not think, however, that we are at liberty thus to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which it expressly refrained from reexamining, although urged to do so, in the very recent case of Sweatt v. Painter, 70 S.Ct. 848. It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded."

In 1955, in Flemming, an intrastate transportation case, reversing the district judge, the court wrote:

"We do not think that the separate but equal doctrine of Plessy v. Ferguson, supra, can any longer be regarded as a correct statement of the law. That case recognizes segregation of the races by common carriers as being governed by the same principles as segregation in the public schools; and the recent decisions in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, which relate to public schools, leave no doubt that the separate but equal doctrine approved in Plessy v. Ferguson has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of Henderson v. United States, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302, where segregation in dining cars was held violation of a section of the interstate commerce act providing against discrimination."

Within this five year interval the Supreme Court had spoken pertinently but once, in the case of Brown v. Board of Education, 347 U.S. 483, since Bolling v. Sharpe, 347 U.S. 497, did not discuss Plessy v. Ferguson and appears to have been decided on a parity of reasoning. My study of Brown has convinced me that it left unimpaired the "separate but equal" doctrine in a local transportation case and I perceive no pronounced new doctrinal trend therein.

[*Limitation Noted*]

Of course I appreciate the care with which the Supreme Court limits its pronouncements upon great constitutional questions to the narrow issues before it and the only issue in Brown involved a collision between the Fourteenth Amendment and state laws commanding segregation in the public schools. But in Brown the Court's opinion referred to Plessy v. Ferguson six times and to its "separate but equal" doctrine on four occasions. It epitomized its concept of that doctrine as follows: "Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate." Its ultimate conclusion was, and this I conceive to be the rationale of its decision, "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

[*Area Excluded*]

It seems to me that the Supreme Court therein recognized that there still remains an area within our constitutional scheme of state and federal governments wherein that doctrine may be applied even though its applications are always constitutionally suspect and for sixty years it may have been more honored in the breach than in the observance. Granted that the trend of its opinions is to the effect that segregation is not to be permitted in public facilities furnished by the state itself and the moneys of the state, as in the case of public schools, or public parks, *cf.* Muir v. Louisville Park Theatrical Association, 347 U.S. 971; Dawson v. Mayor and City of Baltimore, 220 F.2d 386, affirmed 350 U.S. 877, or municipal golf courses, *cf.* Rice v. Arnold, 340 U.S. 848; Holmes v. City of Atlanta, 350 U.S. 879, on the plain theory that if the state is going to provide such facilities at all, it must provide them equally to the citizens, it does not follow that it may not be permitted in public utilities holding nonexclusive franchises.

If that doctrine has any vitality, this is such a case in which it has been applied fairly.

According to its teaching not absolute, but substantial equality is required. Such equality is not a question of dogma, but one of fact. Under the undisputed evidence adduced upon the hearing before us practices under the laws here attacked have resulted in providing the races not only substantially equal but in truth identical facilities.

In my opinion the holding of the Court in Morgan v. Virginia, 328 U.S. 373, that the attempt of a state to require the segregation of passengers on interstate busses results in the imposition of an undue burden on interstate commerce is wholly irrelevant to the issue before us. And equally inapposite is reference to Henderson v. United States, 339 U.S. 816, which held that rules and practices of interstate railroad carriers requiring the segregation of passengers in dining cars were offensive to Section 3(1) of the Interstate Commerce Act making it unlawful for a railroad in interstate commerce "to subject any particular person, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . ."

The supremacy of the federal government in matters affecting interstate commerce is axiomatic. Cases involving the exercise of its power in that realm shed no light on Fourteenth Amendment problems. It does seem quite clear that by its terms the Congress is given the power and duty to enforce the Fourteenth Amendment by legislation. Thus the Congress would have the power, thus derived, to proscribe segregation in intrastate transportation. It is worthy of note that for sixty years it has not seen fit to do so.

While any student of history knows that under our system of government vindication of the constitutional rights of the individual is not, and ought not to be, entrusted to the Congress, its reticence to intrude upon the internal affairs of the several states should caution us against doing so where the path of duty is not plainly marked and when we must hold a clear precedent of the Supreme Court outmoded.

Because I would dismiss the action on the authority of Plessy v. Ferguson, I do not reach the procedural questions discussed in the majority opinion. I respectfully dissent.

TRANSPORTATION

Buses—Alabama

Aurelia S. BROWDER et al. v. W. A. GAYLE, etc., individually and as members of the Board of Commissioners of the City of Montgomery, et al.

United States District Court, Middle District, Alabama, June 19, 1956, No. 1147.

SUMMARY: The judgment granting the permanent injunction in the above case but providing for its suspension in event of appeal follows:

Before RIVES, Circuit Judge, and LYNNE and JOHNSON, District Judges.

PER CURIAM.

JUDGMENT

This cause came on to be heard before a three-judge court duly convened pursuant to the provisions of Title 28, United States Code, Sections 2281 and 2284.

After trial on the merits and careful consideration of the evidence therein adduced and after oral arguments and submission of briefs by all parties, the Court, being fully advised in the premises, found in an opinion handed down on June 5, 1956, that the enforced segregation of Negro and white passengers on motor buses operating in the City of Montgomery as required by Section 301 (31a, 31b and 31c) of Title 48, Code of Alabama, 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City of Montgomery, 1952, violates the Constitution and laws of the United States.

Now in, accordance with that opinion, it is Ordered, Adjudged and Decreed that Section 301 (31a, 31b and 31c) of Title 48, Code of Alabama, 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City of Montgomery, 1952, are unconstitutional and void in that they deny and deprive plaintiffs and

other Negro citizens similarly situated of the equal protection of the laws and due process of law secured by the Fourteenth Amendment to the Constitution of the United States and rights and privileges secured by Title 42, United States Code, Sections 1981 and 1983.

It is further Ordered, Adjudged and Decreed that the defendants, their successors in office, assigns, agents, servants, employees, and persons acting on their behalf, be and they are hereby permanently enjoined and restrained from enforcing the aforesaid statutes and ordinances or any other statutes or ordinances which may require plaintiffs or any other Negroes similarly situated to submit to segregation in the use of the bus transportational facilities in the City of Montgomery, and from doing any acts or taking any action to require the Montgomery Bus Lines, Inc., or its drivers, or any other public bus transportation facility, or its drivers, to enforce such statutes or ordinances requiring the segregation of white and Negro passengers in the operation of public motor bus transportation facilities in the City of Montgomery.

Costs are taxed against defendants.

The injunction granted by this judgment is suspended for a period of ten days from the date hereof, and in the event an appeal is taken from this judgment within such period, such injunction will be further suspended until an additional order can be entered suspending such injunction during the pendency of such appeal.

Judges Rives and Johnson concur in this judgment. Judge Lynne dissents therefrom except as to the order of suspension, in which he concurs.

TRANSPORTATION
Buses—South Carolina

Sarah Mae FLEMMING v. SOUTH CAROLINA ELECTRIC & GAS COMPANY, a corporation.

United States District Court, Eastern District, South Carolina, June 13, 1956, Civ. No. 4386.

SUMMARY: A Negro woman in South Carolina brought an action for damages under the federal Civil Rights Acts against an intrastate bus company. The suit was grounded on the action of an employee of the bus company, a bus driver, in requiring the plaintiff to change her seat on a bus in accordance with South Carolina's segregation law. The United States District Court where the action was brought dismissed the case on the ground that the state statute requiring segregation by race was valid. 128 F. Supp. 469 (1955). On appeal, the Court of Appeals, Fourth Circuit, reversed and remanded, applying the principle of the *School Segregation Cases* to intrastate transportation and holding that the District Court had jurisdiction under the Civil Rights Act, since the bus company, through its driver, was acting under color of state law. 224 F.2d 752, 1 Race Rel. L. Rep. 183 (1955). On appeal by the bus company to the United States Supreme Court, that court dismissed the appeal on the ground it had been prematurely brought. 351 U.S. 901, 76 S.Ct. 692, 1 Race Rel. L. Rep. 513 (1956). On the remand to the federal district court, that court dismissed the action. The ground given for dismissal was that the decision of the Court of Appeals could not be made retroactive so as to invalidate the state segregation statute as of the time of the occurrence of the event in question. A further ground stated that the bus driver could not be held to have been enforcing the statute in requiring the plaintiff to move as she was not, at the time, violating the statute.

TIMMERMAN, District Judge.

Mr. Foreman and Gentlemen of the Jury:

On yesterday afternoon, after the close of plaintiff's evidence, I heard defendant's motion "for an order dismissing the plaintiff's action * * * upon the grounds that under the facts and law the plaintiff has shown no right to relief".

At first, I thought the motion should be denied, but upon reflection I think the motion should be granted, and wish to state my reasons therefor.

No person has a civil right to violate a valid and subsisting state law.

The state law requiring equal but separate accommodations for the races on local busses operated in this State was valid and subsisting at the time plaintiff claims her civil rights were violated.

The State segregation law under color of which the plaintiff alleges the defendant acted was constitutional and complied with the construction of the 14th Amendment given by the United States Supreme Court in the much cited Plessy Case in 1896.

The Plessy Case, like the instant case, was a transportation case. The doctrine of the Plessy Case as applied to local bus transportation has never been changed or repudiated by the Supreme Court.

[*Decision not Retroactive*]

However, the Plessy Case has been repudiated or reversed by the 4th Circuit Court of Appeals, as applied to travel by bus, but I do not understand that the Court of Appeals intended to make its reversal of the Plessy Case retroactive.

The 4th Circuit Court of Appeals did not express its disagreement with the Plessy case until some time after the events complained of in the complaint and not even until some time after the complaint in this case had been filed.

I do not believe that the Court of Appeals intended to place its approval on the strange and unAmerican doctrine that any court, under our established system of government, has the power to make retroactive laws so as to make a person liable in damages for acts done which were at the time of their doing perfectly lawful. This is important in the present case because it concerns the changing of a well understood constitutional doctrine that had not been changed by any legal authority for well over half a century.

When I was a boy the Constitution ranked next to the Bible in the thinking of good citizens. Now there are those who seem to think that it has no higher standing than that of a statute, if even that high.

[*No Violation of State Law*]

Moreover, if in the opinion of the Court of Appeals I am wrong about the conclusion just stated, I think the case should be dismissed for another reason, namely:

The evidence of the plaintiff shows that the custom on defendant's busses in the City of Columbia was for all passengers, both white and Negro, to use the same door entering the bus and to use another door in leaving a bus, which was the same for all passengers. Also that it was further the custom for white passengers to occupy the front seats and Negro passengers the rear seats; and that there was no established line marking a division of the seats, but on the contrary the number of seats occupied by each race varied in proportion to the number of each on the bus, and that on the occasion in question plaintiff was not sitting or attempting to sit among white passengers, that no white passengers were standing and that she was sitting behind white passengers. Hence it would appear from such uncontroverted testimony that the bus driver was not acting under color of state law to enforce racial segregation on the bus, whatever other evil motive he may have had for ordering plaintiff to change her seat. This Court does not have jurisdiction of any such other situation.

The case should be withdrawn from the jury and be dismissed.

It is so ORDERED.

GOVERNMENTAL FACILITIES

Beaches and Swimming Pools—Florida

Ozie YOUNGBLOOD et al. v. CITY OF DELRAY BEACH, Florida, et al.

United States District Court, Southern District, Florida, May 15, 1956, Civ. No. 6091.

SUMMARY: An action was filed in federal district court in Florida seeking admission to municipally operated recreation facilities of Delray Beach, Florida, on a racially non-segregated

basis. Prior to a hearing in the case, the parties agreed to a dismissal without prejudice, with the city of Delray Beach stating that the city did not practice racial segregation at its facilities. **See p. 733, *infra*.**

CHOATE, District Judge.

ORDER DISMISSING CAUSE WITHOUT PREJUDICE

This cause came before the Court on the oral stipulation announced in open court that the case may be dismissed without prejudice to the plaintiffs. Upon consideration thereof and after being advised in the premises, it is

CONSIDERED, ORDERED AND ADJUDGED that this cause be and the same is hereby dismissed without prejudice to the plaintiffs, each party to bear their own costs.

DONE and ORDERED in West Palm Beach, Florida, this 15th day of May, 1956.

GOVERNMENTAL FACILITIES
Golf Courses—Florida

Charles A. AUGUSTUS et al. v. The City of PENSACOLA, Florida, a Municipal Corporation.

United States District Court, Northern District, Florida, May 24, 1956, Civ. No. 724.

SUMMARY: Negroes in Pensacola, Florida, brought a class action in federal district court seeking to enjoin the denial by officials of that city of permission to use municipal recreation facilities, including the municipal golf course. On a motion by the plaintiffs for summary judgment, the court granted the motion and issued the injunction but suspended the operation of the injunction pending the putting into effect of reasonable regulations by the city for the use of recreational facilities.

DeVANE, District Judge

This cause coming on for hearing upon Motion of the Plaintiffs for Summary Judgment and the Court being advised in its opinion; it is hereby

ORDERED, ADJUDGED AND CONSIDERED that the Plaintiffs, as citizens of the City of Pensacola, Escambia County, Florida, have rights in the enjoyment of the facilities owned by the City of Pensacola, a Municipal Corporation, including the facility known as "Osceola Golf Course", and that the said Plaintiffs are entitled by right to the privileges of using and enjoying the use of the golf course located thereon; it is further

CONSIDERED, ORDERED AND ADJUDGED that the Defendant, its agents, employees and servants, be, and they are hereby restrained and enjoined from refusing to allow the Plaintiffs and other Negroes similarly situated, because they are Negroes, to make use of said facilities on a substantially equal basis with white citizens of the municipal facilities for playing golf. The effect of this judgment will for a reasonable time, and until the further order of this Court be postponed in order that the Defendant may be afforded reasonable opportunity to promptly prepare and put into effect regulations for the use of the municipal golf facilities compatible with the rights of the Plaintiffs and the rights of other citizens of the City of Pensacola, and for the best interest of the City of Pensacola and its citizens, and to preserve the peace and tranquility of the community, but to the end that equality of treatment of white and colored citizens must be afforded which will be secure to both and with such reasonable regulations that will guarantee the security of enjoyment to both groups of citizens free from disturbances from other groups, parties or persons.

DONE AND ORDERED in Chambers in Pensacola, Escambia County, Florida, this 24th day of May, A. D. 1956.

PUBLIC ACCOMMODATIONS
Private Clubs—New York

CASTLE HILL BEACH CLUB, Inc. v. Ward B. ARBURY, et al.

New York Supreme Court, Appellate Division, First Department, April 18, 1956, 150 N.Y.S.2d 367.

SUMMARY: Based on the complaint of a Negro woman that she was denied accommodation at the Castle Hill Beach Club because of race, the New York State Commission Against Discrimination after hearings, issued a cease and desist order against the Club. The Club petitioned the Supreme Court, Bronx County Special Term, Part I, to annul the order of the Commission. The Commission filed a cross motion for enforcement of its order. The Court found that the Beach Club was, in fact a "place of public accommodation" within the term of the statute and denied the motion of the petitioner. 142 N.Y.S.2d 432, 1 Race Rel. L. Rep. 186 (1955). (See also 144 N.Y.S.2d 747, 1 Race Rel. L. Rep. 382 (1955)). On appeal the Appellate Division affirmed but modified the order.

Before BREITEL, J. P., and BOTEIN, RABIN, COX and BASTOW, JJ.

PER CURIAM.

The record sufficiently supports the determination of Special Term confirming the findings of the State Commission Against Discrimination. Paragraph 3(d) of the State Commission's order, however, exceeds the necessary limits and should be modified to read substantially as follows: "Post and maintain in a conspicuous place on the counter of petitioner's premises at 355 Castle Hill Avenue, Bronx, New York, a suitable notice providing: 'Admission in this establishment is available to the public for seasonal guests only and for daily guests introduced by them, but without regard to race, creed, color or national origin'." As so modified, the order is unanimously affirmed with $20 costs and disbursements to the respondent. Settle order on notice.

PUBLIC ACCOMMODATIONS
Restaurants—Illinois

PEOPLE of the State of Illinois v. Thomas KAVADAS

County Court, Lee County, Illinois, April 30, 1956, Info. No. 4353.

SUMMARY: The defendant, owner of a restaurant, was tried in an Illinois state court on an information charging him with a violation of the Illinois civil rights statute in having refused to serve Negroes in his restaurant. It appeared that the refusal of service was made by the son of defendant who was employed as a cook in the restaurant and who, the court found, had not been instructed by the defendant to refuse service to the complaining witnesses. The court thereupon acquitted.

GEHANT, Judge.

In this case the People of the State of Illinois are the Plaintiffs and Thomas Kavadas is the Defendant.

The Defendant was charged in an Information of Denial of Civil Rights under Paragraph 125, Section 1, Chapter 38 of the Criminal Code of the State of Illinois with refusal to serve food, etc. through his agent, Ernest Kavadas, to Winston McReynolds and Almond Morrison.

James E. Bales, State's Attorney, appeared on behalf of the People and Elwin S. Wadsworth, attorney, appeared on behalf of the Defendant, Thomas Kavadas. His plea of "Not Guilty" was entered and his jury waiver executed and the case was tried before the Court.

[*Testimony Summarized*]

The testimony introduced by the State and by the Defendant is substantially as follows:

That on April 16, 1956, Winston McReynolds, Raymond E. Johnson, Bruce R. Stouffer, Rodney E. Bollman, Almond Morrison and George Reed had been at the Second Baptist Church in Dixon attending a meeting of the Soft Ball League of Managers and Umpires of Churches in Lee County. Winston McReynolds, Almond Morrison and George Reed were colored and the other three were white.

They had nothing to drink and the meeting lasted to 9:30 to 9:40 o'clock P.M.

After the meeting, Ray Johnson suggested that they have coffee.

All of this group, except George Reed, went to the Depot Cafe at the corner of Depot Avenue and 7th Street in Dixon, Lee County, Illinois.

The five men, including Winston McReynolds and Almond Morrison, went up to the counter and sat down. The waitress was present and seeing this group, went back into the kitchen and then Ernest Kavadas came out of the kitchen to wait on them. There was no conversation between McReynolds and the waitress and no conversation between the waitress and any of the other members of the group.

[*Refused Service*]

That Winston McReynolds stated that he was refused service by Ernest Kavadas; that Winston McReynolds asked Ernest Kavadas who the proprietor of the place was and Ernest Kavadas stated that Thomas Kavadas was the proprietor and the owner, and that he was at home asleep at the time; that the purpose of Winston McReynolds going into the restaurant was to get a cup of coffee.

Winston McReynolds explained the provisions of the statute to Ernest Kavadas concerning Civil Rights.

Thomas Kavadas, owner and proprietor of the restaurant was not present at any time during the period when Winston McReynolds and the others were in the restaurant; that Ernest Kavadas stated to Winston McReynolds that he was sorry that they didn't serve colored people; that Mr. McReynolds asked him if he knew he was violating the law; and that Winston McReynolds and the others with him did not have anything to drink while in the Depot Cafe.

Ernest Kavadas was called as a witness for the State and later by the defense. Upon his testimony for the State, he stated that his occupation was that of cook; that his father was the owner of the restaurant and that his father paid him a salary; that on the evening in question, April 16, 1956, Ernest Kavadas came out of the kitchen to get a glass of water and he stated he had not been approached and that he had never had to serve colored persons; and that Winston McReynolds asked him if he knew what the law of the State of Illinois was concerning serving colored people. Ernest Kavadas stated that they had a lot of colored people that asked for something and that he fixed it up for them in the kitchen and they took it out; that it didn't make any difference who the person was, that he fixed the package as good for one as another. After the conversation, Ernest Kavadas stated he had to go back into the kitchen because he had something on the stove and he further stated that McReynolds and his party left the restaurant.

[*Confined to Kitchen*]

Ernest Kavadas stated his duties as cook usually confined him more to the kitchen; that he is employed as a cook; that sometimes where there is a shortage of help he would cook and wait on customers; that on April 16, 1956, there was a shortage of help.

Ernest Kavadas stated he did not give them any water and didn't give them anything.

Rodney E. Bollman stated that Ernest Kavadas approached Winston McReynolds and told him they didn't serve colored people in their restaurant and that McReynolds asked him if he knew he was violating a State law.

Almond Morrison stated that McReynolds asked for a cup of coffee and was told by Ernest Kavadas that they didn't serve colored people; that it was against the policy of the owner, who was Ernest Kavadas' father, and even the owner of the building.

Thomas Kavadas testified that his business was restaurant; that he was the owner and keeper of the Depot Cafe; that he was not present in the Depot Cafe on the evening of April 16, 1956; that no one else has a financial interest in this restaurant; that he had in his employ, Ernest Kavadas, his son, as a cook and that he was employed as a cook on the night of April 16, 1956; that he is paid a salary for his services. He was asked whether his employment (the employment of Ernest Kavadas) was divided so that he is cook and also waiter and his reply

was, "Just cook." Thomas Kavadas testified that he knew nothing about the controversy in the restaurant on April 16th until the Sheriff brought him into Court; that he has in his employ on Monday nights, one dishwasher, one waitress and one cook; that when they have a crowd, the cook can come out and pick up the dishes. Thomas Kavadas stated that he worked in the restaurant himself as a cook in the mornings. He also stated that in the course of operating the restaurant since January 1, 1956 to April 16, 1956 while his son was employed as a cook, that he did not give him any instructions nor did he have any conversation with him as to giving or denying service to any persons of any kind. He stated that his son does not represent him when he is not there; that he is supposed to stay in the kitchen and cook, and if they are crowded and the waitress can't get all of the dishes picked up, he can come and help her.

Thomas Kavadas was asked, "Does he (Ernest Kavadas) ever wait on table?", and his answer was, "Not that I know of."

[*Cook's Authority*]

Thomas Kavadas, in answer to the question, "Do you know if Ernest Kavadas waited on people on April 16th?", stated, "No, because I wasn't there."

The Information charges, in substance, that Thomas Kavadas, then and there by his agent, Ernest Kavadas, refused to serve food, to-wit: Sandwiches and coffee, to Winston McReynolds and Almond Morrison in the Depot Cafe on April 16, 1956.

The Court has examined the case of Wilkinson vs. Hart, decided in 1949 and reported in 338 Illinois Appellate on Page 210, in which the Court held as follows:

> "Even if employee of corporation operating public restaurant was retained in his employment after refusing to serve food to a colored woman, corporation was not liable to such woman for damages under Civil Rights Statute, where employee, a waiter and sandwich maker, was not authorized or instructed to discriminate against anyone in serving food and had no right to undertake to conduct restaurant business in any manner different from standard prescribed by owner."

This case was the only case submitted by counsel for the Defendant. No other authorities were submitted.

From a consideration of the facts and the law in this case, the Court has come to the conclusion that Thomas Kavadas was operating the Depot Cafe on April 16, 1956 as the sole owner; that Ernest Kavadas was employed by him as a cook who, incidentally rendered other services; that Ernest Kavadas was paid a salary; that Winston McReynolds and others entered the Depot Cafe on the evening of April 16, 1956 and sat at the counter, but immediately went back into the kitchen; that Ernest Kavadas came out of the kitchen and talked to Mr. McReynolds informing him that he could not be served; that Thomas Kavadas testified that on April 16, 1956 and prior thereto, Ernest Kavadas was employed as a cook on a salary; that at no time did Thomas Kavadas give Ernest Kavadas any instructions or have any conversation with him as to the giving or denying of service to any persons of any kind.

[*Not Guilty*]

Therefore, pursuant to the decision in the case of Wilkinson v. Hart, above cited, and it being the last decision and expression of the Appellate Court wherein the facts appear to be substantially the same as in the case now before me, the Court can only come to the one conclusion, and that is that the Defendant, Thomas Kavadas, is not guilty as charged in the Information. This decision seems to be the controlling factor in this case as to the facts testified to.

Therefore, it is the judgment of the Court that the Defendant, Thomas Kavadas, is not guilty as charged in the Information.

Off the record, I would like to state that this controversy could have been avoided if the waitress, or even Ernest Kavadas, had furnished Winston McReynolds and the others in the group with their cups of coffee, as they are all respectable citizens of our community.

EMPLOYMENT

Fair Employment Laws—New York

In re JEANPIERRE

New York Supreme Court, Special Term, Part I, New York County, June 27, 1956, ———N.Y.S.2d ———.

SUMMARY: A Negro in New York brought a complaint against Pan American World Airways System before the State Commission Against Discrimination alleging that he was denied employment solely on account of his race or color. The Commission investigated and determined that the denial of employment was not made on the basis of racial discrimination. The complainant petitioned a New York Supreme Court for review of the Commission's determination. That court held that there was not sufficient proof of discrimination on the basis of race in denying employment and affirmed the action of the Commission.

GREENBERG, J.

Petitioner moves pursuant to article 78 of the Civil Practice Act for an order annulling and rescinding a determination of the State Commission Against Discrimination which dismissed his complaint, charging that Pan American World Airways System had refused him employment as a flight steward because of his race, and remitting his grievance to the Commission for a public hearing on the ground that there is probable cause to invoke appropriate action under article 15 of the Executive Law for breach of its provisions against discrimination.

Petitioner is an American Negro. He applied for employment as a flight steward with Pan American at its Long Island City office in December, 1954. He was told to return the following month, when he renewed his application. The personnel director, Mr. Toberty, directed the petitioner to fill out an application form and he was thereupon referred to Mr. Parrott, superintendent of flight service for Pan American. After review of his application, petitioner alleges that Mr. Parrott conceded that he was personable, qualified and fluent in French, but nevertheless attempted to dissuade him from applying for the position on the grounds that he would be subject to racial discrimination, that flying was hazardous, that it was bad for one's ears, and that he would probably be happier in other employment—especially a teaching job. The basic qualifications for this job are American citizenship, high school diploma, age twenty-one to thirty-five, physical requirements, use of proper English, fluency in a foreign language, and experience in handling the public. Petitioner avers that no comment or criticism of his specific educational or experience background relating to the qualifications for the job of flight steward was raised during this interview. Thereafter, petitioner appeared for questioning before a panel of authorities of Pan American, including Messrs. Toberty and Parrott. He was subsequently advised in a letter dated January 28, 1955, of his rejection because his qualifications were unsuited to Pan American's "specialized requirements."

[*Pan American Employment Policy*]

Parenthetically, it should be noted that Pan American does not now nor has it ever employed a Negro in any flight capacity. Attention is drawn to an investigative survey conducted by the Urban League of Greater New York in 1955 in which it is reported that no scheduled air line in New York employs Negroes as pilots, co-pilots, flight engineers, navigators, hostesses, flight stewards or flight mechanics. Conversely, it appears from the records of the Atlantic division of Pan American that prior to December, 1954, no Negro had ever applied for the position of flight steward, and during the time between the petitioner's application and the date of its final rejection only two other Negroes submitted applications. Such revelations are, of course, not dispositive of the issue herein, yet they shed light on the general question of fair employment practices.

[*Commission's Investigation*]

Convinced that his rejection was due to his color rather than any deficiency in his qualifications, petitioner registered a complaint with the respondent, the State Commission Against Discrimination, in February 1955. His complaint

was referred to Commissioner Pinto and he supervised the respondent's investigation in the matter. Petitioner alleges that the commission's investigator reported that Pan American's personnel director claimed that his rejection resulted from his appearance, that is, flashy clothing and moustache. Petitioner further alleges that during the investigation, Commissioner Pinto suggested to him that he seek other employment and encouraged him to accept a higher paying non-flying job as cargo representative with Pan American.

Upon the petitioner's rejection of this idea, Commissioner Pinto arranged a second interview for him with representatives of the airline company. The second interview was held on June 6, 1955, and petitioner's renewed application for flight employment was no more productive than the initial application. At the time of this second interview, petitioner was unable to see the personnel director of Pan American, as had been arranged by Commissioner Pinto, but he was questioned by a panel of five or six persons representing Pan American. This interview was equally futile as far as the petitioner was concerned.

[*Petitioner's Qualifications*]

It was stated on behalf of Pan American in a letter to Commissioner Pinto, dated June 17, 1955, that petitioner's employment history was "nebulous and somewhat inconsistent." The commissioner notified petitioner in October, 1955, that his second complaint was rejected, stating, among other things, that "the evidence is insufficient to warrant a finding that you were rejected because of your race and color." Petitioner's appeal to the chairman of the commission was denied on November 14, 1955.

Pan American's field representative and Mr. Toberty, its industrial relations manager, aver that petitioner's rejection was primarily because of his employment record. The application form called for the listing of four previous employments. Petitioner's initial compliance with this requirement consisted of listing three previous employments; from February, 1946, to June 1946; February, 1949, to June, 1950; and December, 1953, to November, 1954.

Moreover, on the reinterview arranged by Commissioner Pinto, it was elicited that the petitioner's work record included eighteen employments over sixteen years. He had a varied job experience history, including employment as a salesman, kitchen utility man, waiter, sand blast operator, clerk-typist, machine operator, guard, special deputy sheriff and French tutor.

Proper appraisal would appear to sustain the propriety of petitioner's rejection on the basis of his work record if in fact the rejection was honest and was not predicated on his color. The investigating commissioner has so found, and this court may not interfere with his findings or that of the commission when based on substantial evidence.

[*Evidence as to Discrimination*]

There are several suspicious circumstances, one of which was alluded to by the investigating commissioner himself, namely, that perhaps the petitioner was rejected because of his color, which at least would require further inquiry by the commission in this particular case, were it not for the petitioner's unimpressive if not wholly irresponsible work record. Here an avenue of escape has been opened for Pan American by the petitioner's own past work history. Judicial intervention is possible only if there were ample evidence to show that petitioner was rejected solely because of his color.

Judicial aid may not be obtained on mere suspicion or conjecture. It would appear that one of the reasons, at least, for rejecting petitioner was because of his color, but this court cannot say that that was the persuasive reason. In fact, eighteen jobs occupied by a man in sixteen years certainly shows instability, if nothing more, and the position for which petitioner made application required calm judgment, maturity in thinking and stability.

[*Air Lines Employment Policies*]

At the conclusion of the hearing on this application the court talked to the chairman of the respondent and asked him to make further inquiry into the particular matter then pending before the court. The chairman was of the opinion that a careful investigtaion had been conducted by Commissioner Pinto and that no purpose would be served in attempting a further investigation in so far as this particular petitioner is concerned. The chairman, however, assured the court that continued efforts and investigation would be made not only of the race problem as it relates to Pan American but

as it relates to all air lines, with a view to determining whether there is a concerted policy on the part of the air lines to exclude Negroes from the positions of steward, pilot and co-pilot. Such an investigation would indeed be revealing, in this court's opinion. Undoubtedly there are many problems with which air lines have to contend, but they are problems which will have to be met sooner or later and disposed of in accordance with the written law of our state.

Accordingly, the application is in all respects denied.

TRIAL PROCEDURE

Juries—Federal Courts

UNITED STATES v. Joseph BRANDT et al.

United States District Court, Northern District, Ohio, July 29, 1955, 139 F.Supp. 349.

SUMMARY: Ten white persons and one Negro were indicted by a federal grand jury for violation of the Smith Act. The defendants attacked the indictment in a motion to dismiss on grounds that the grand jury which brought the indictment was unlawfully constituted. They alleged that manual workers and Negroes were systematically excluded or limited in representation and that jury officials failed to employ methods to insure representation of a cross-section of the community on the jury list. At the hearing on the motion to dismiss, the federal district court found that there was no basis to the allegations of discrimination.

McNAMEE, District Judge.

In their motion to dismiss the indictment on the claim that the grand jury was unlawfully constituted, the defendants, assert substantially the same grounds as appear in other Smith Act cases. Their grounds of attack may be summarized as follows:

1. That manual workers and Negroes were intentionally and systematically limited to a mere token representation on the jury lists.

2. That the jury officials failed to employ methods that would insure representation of a cross-section of the community on the jury lists.

No claim is or could be made that manual workers and Negroes were totally excluded from jury service in this court.

At the hearing upon the motion the defendants presented more than forty witnesses, including the clerk and commissioner. Taking the position that the defendants' evidence was not sufficient to make out a *prima facie* case, the Government presented no witnesses but was content to rely upon the testimony elicited upon cross-examination of the clerk and commissioner.

[*Methods of Selection*]

The system of selection, which has been in effect without change for a great many years, was designed to provide a fair representation of persons from nineteen counties of the Eastern Division of the Northern District of Ohio. These include highly industrialized centers such as Cleveland, Youngstown, Akron and Canton, as well as predominantly rural communities. To secure jurors from the counties outside of Cuyahoga, the clerk and commissioner send letters to postmasters, jury commissioners, mayors and other public officials and to some private individuals, requesting recommendations of names of persons possessing the qualifications of jurors. A form letter which is signed jointly by the clerk and commissioner is forwarded separately by each of them to different persons outside of Cuyahoga County who are considered to be well acquainted in their respective communities. The letter makes no reference to the type or character of persons to be recommended other than to express the desire of the jury officials to obtain "good jurors." Enclosed with the letter is a suggestion sheet which contains blank lines upon which to write the names, addresses, age and occupations of the persons recommended. At the top of the suggestion sheet appears the following:

> "The following persons I consider qualified and nonexempt as jurors. (See reverse side for qualifications and exemptions)."

On the reverse side there is quoted Section 1861

of Title 28 U.S.C., defining qualifications of jurors, and Section 1862 of Title 28 U.S.C., which enumerates the classes exempt from jury service. When the suggestions of the sponsors are received by the clerk and commissioner the names received by each of them are listed upon separate sheets. From these lists the clerk and commissioner make selections of the persons by indicating their choice by blue and red marks opposite the names. While from time to time there are a few sponsors from Cuyahoga County, practically all the names of prospective jurors who reside in this county are selected by the clerk from the names of persons who have served as jurors in the Common Pleas Court of Cuyahoga County during the previous year. These selections are made from cards in the files in the office of the Cuyahoga County Jury Commissioner, which contain no information other than the names, addresses and occupations of the jurors. The Common Pleas Court obtains its jurors by selecting them according to key number from the list of registered voters of the county. From the names obtained from the Cuyahoga County jury list the clerk and commissioner again make selections by placing blue and red marks opposite the names. All the names selected by both methods are then placed on a so-called master list, and small cards bearing these names are alternately placed in the jury box by the clerk and commissioner. At the time the clerk and commissoner make their selections they have no information as to the race, creed or color of any of the persons chosen by them and no record has even been kept of the race or religion of any juror or prospective juror. An effort is made by the clerk and commisioner to obtain a territorial representation based upon the population of the respective counties. About forty per cent of the population of the area is in Cuyahoga County.

For the purpose of impanelling a grand jury, about one hundred names are drawn from the box. Approximately forty to fifty of those whose names are drawn are excused on the grounds of illness, disability, and because jury service would be an extreme hardship. From those not excused a grand jury of 23 persons is impanelled. This occurs about once a year. On various occasions throughout the year the same system is followed in drawings of names for petit jurors in civil and criminal cases.

The Negro population in Cuyahoga County is more than ten per cent. In the eighteen counties outside of Cuyahoga, Negroes constitute about 4.3% of the population, and for the entire Eastern Division of the Northern District of Ohio the proportion of Negroes is about seven per cent. According to the defendants, the proportion of manual workers is 59%.

[*Manual Workers*]

It will be convenient first to discuss the claim of discrimination against manual workers. As noted above, no record has been kept of the race or religion of any juror, but the occupations of the prospective jurors appear on the sponsors' lists of recommendations, and since about four years ago this information has been placed upon the index cards in the clerk's office. In support of their claim of discrimination against manual workers defendants rely in large part upon statistical tables designed to demonstrate that disproportionate representation of this class on the jury lists was the result of a conscious purpose to discriminate. These tables were not offered in evidence as exhibits and the Government was afforded no opportunity by way of cross-examination to test the accuracy of the computations or the good faith and competency of those who compiled the statistical data. However, these tables may be considered as argumentative compilations made from jury lists received in evidence which show the occupations of the jurors. The tables purport to show the proportions of manual and non-manual workers as classified by defendants on grand and petit jury panels and on the 1953 master list. This last mentioned list does not contain the names of any of the persons in the jury pool from which the members of the indicting grand jury or any of the grand juries for nine previous years were drawn. The names of the indicting grand jury were drawn from the box on September 23, 1953. It was not until some time in October, 1953 that the names of the persons on the 1953 list were placed in the jury box.

[*Defendants' Statistics*]

The tables submitted by defendants are inaccurate and unreliable. For example, Table VII is an analysis of the occupational status of 777 persons who were called for jury service on twenty-six petit jury panels. An examination of the typewritten lists containing these names discloses that the names of many jurors who

served on more than one panel re-appear on the list several times. It is a fair estimate that instead of 777 persons of various occupations there were less than half that number of different persons who served on these panels. As a result of defendants' failure to make allowance for this repetition of names on the list, their computations of the proportions of manual and non-manual workers on the twenty-six panels present a statistical picture that is badly out of focus. These tables are based on the assumption that 59% of the working force is engaged in some form of manual labor. However, the classifications within this category are arbitrary and do not give effect to all the factors considered by the Census Bureau. Defendants' tables are unreliable for the further reason that they exclude from their computations about forty per cent of persons serving as jurors who were "housewives" or "retired men." It is a fair assumption that through marriage, housewives represent the same economic status and social outlook as their husbands and that the economic statuses and social viewpoints of "retired men" are related directly to their former employment. Yet no consideration of these factors is taken into account by the defendants. Their computations are limited to a determination of the occupational status of about sixty per cent of the jurors on the lists. However, even if defendants' computations be accepted as correct, the evidence does not establish a *prima facie* case of discrimination against manual workers. In United States v. Flynn, 2 Cir., 216 F.2d 354, 382, where the claim of discrimination was rejected, the proportions of manual workers on the three lists there referred to was in each instance less than the proportion of manuals on the lists in this court as computed by defendants. According to defendants' computations the proportion of manual workers on the indicting grand jury was 27.3%. This was not grossly disproportionate and furnishes no basis for an inference of discrimination.

[*Jury Service a Burden*]

Jury service is generally regarded as a burden on all who serve. This burden rests most heavily upon wage earners, whose compensation is determined by hourly rates of pay and upon manual workers generally. It is not surprising that in recognition of this fact fewer persons in this class were selected as prospective jurors. The logic of experience argues persuasively against the practice of calling large numbers of manual workers for jury duty. In his appearance before the Committee of the Judiciary of the 79th Congress, Chief Judge Knox commented upon the extreme hardship that jury service imposes upon manual workers, and said further:

> "With respect to the item last-mentioned, it is easy to say that jury duty should be regarded as a patriotic service, and that all public-spirited persons should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship. With that statement I am in full accord, but it does not solve the difficulty. Adequate provision for one's family is the first consideration of most men. And if, with this thought predominant in a man's mind, he is required to perform a public service that means a default of an insurance premium, the sacrifice of a suit of clothes or the loss of his job, he will entertain feelings of resentment that will be anything but conducive to the rendition of justice. In other words, persons with a grievance against the Government or who serve under conditions that expose them to self-denial are not likely to have the spiritual contentment and mental detachment that good jurors require."

In United States v. Foster, D.C., 83 F. Supp. 197, 208, there is quoted the testimony of a union leader who, in explaining his refusal to submit a list of names for jury service, said: Our people "wanted to have nothing to do with juries."

In United States v. Dennis, 2 Cir., 183 F.2d 201, 219, the court observed:

> "Jury duty is a burden to all who serve except to the relatively few who are not gainfully employed and have leisure—such as retired business men, housewives whose children have grown up, and those who welcome any break in the monotony of their lives. But the hardship which it imposes upon a manual worker, especially now that the cost of living has so much increased, is much greater than that upon 'executives' for example, who, ordinarily without serious disarrangement, can be made to serve at specified months. But all times are equally

> inconvenient to one who must work by the day, week or month to support a family, or even himself alone. No one who has not been charged with the duty of excusing such persons knows how strong such an appeal can be."

In United States v. Flynn, supra [216 F.2d 386], Judge Harlan, answering the defendants' contention that discrimination was evidenced by the jury officials' excusal of large numbers of manual workers on the ground of financial hardship, said:

> "We agree with the District Court that this is entirely to be expected, since the financial burden of jury service obviously falls more heavily on those who are dependent for their livelihood upon a wage or salary which would be lost during absence from the job."

Defendants cite no case in which disproportionate representation of manual workers on jury lists has been equated with discrimination. Thiel v. Southern Pacific Co., 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181, upon which they so strongly rely, is not such a case. The issue decided in Thiel was that the total exclusion of wage earners by jury officials was unlawful. It is not without significance that after the Thiel decision Congress conferred authority upon district judges to exclude or excuse any group or class of persons from jury service—

> "for the public interest * * * based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice." Section 1863(b), Title 28 U.S.C.

No such order of exclusion was made here. It is significant, however, that Section 1863(b) reflects legislative recognition that "undue hardship" and "extreme inconvenience" are factors to be considered in selecting persons for jury service, and as experience shows, these factors are present most frequently in the case of manual workers. In discussing the object of the system of selecting jurors, Mr. Justice Frankfurter said:

> "The object is to devise a system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice *without operating too harshly upon any section of the community, and is duly regardful of the public interest in matters outside the jury system.*" Thiel v. Southern Pacific Co., 328 U. S. 217, at page 232, 66 S.Ct. at page 991. (Emphasis supplied.)

[*Demands on Manual Workers*]

In these recent years of worldwide tension it has been imperative that the nation maintain its productive facilities at their maximum capacity. This has resulted in an extraordinary demand for the services of manual laborers. During this period the continued and uninterrupted employment of men in industry has become a matter of vital public concern and has been effective to reduce substantially the proportion of manual workers available for jury service. These are facts of common knowledge of which courts must take judicial notice. It has never been the policy of the law to conscript workers for jury service where their personal welfare would be seriously injured thereby or where competing considerations of public interest present superior claims to their services. In view of the state of the national economy during the past several years it is fairly to be assumed that the proportion of manual workers normally available for jury service has been considerably diminished. It is of course impossible to determine the extent to which such proportion has been reduced, but that it has been reduced substantially below 59% cannot be doubted.

In the light of these facts, any comparison of the proportion of manual workers called for jury service with the proportion of this group in the population is unrealistic and misleading.

[*Proportional Representation Not Required*]

In essence the defendants' argument is a plea for proportional representation of manual workers. So frequently has the Supreme Court disclaimed the necessity of proportional representation as an end in itself that citation of decisions of that court upon the point is no longer necessary. As to the rejection of pleas for proportional representation in Smith Act cases, see United States v. Flynn, supra; Dennis v. United States, supra; United States v. Flynn, D.C., 103 F.Supp.

925; United States v. Frankfeld, D.C., 101 F.Supp. 449; United States v. Forrest, D.C., 118 F.Supp. 504.

[*No Intentional Discrimination*]

The jury officials denied that they intentionally discriminated against manual workers. Their testimony must be accepted as true. Defendants have not made out a *prima facie* case of discrimination against manual workers.

Defendant's statistics show that 84% of the colored working force were engaged in some form of manual labor and that 8.6% is employed in the kindred categories of "sales" and "clerical." Defendants say in their brief:

> "* * * The Negro population is almost exclusively composed of and linked with the category of manual workers."

It may therefore be assumed fairly that the same factor of hardship and the same considerations of public interest that operated to reduce the proportion of manual workers available for jury service had like effect on the proportion of available Negroes. This latter proportion, which is presumably equivalent to 7% of the population, must be discounted substantially to arrive at any fair estimate of the ratio between the proportion of Negroes available for jury service and the proportion of the members of that race on the jury lists.

[*Exclusion of Negroes*]

Defendants make no claim that Negroes as a class were excluded from jury service, and the record is clear that throughout the years covered by the evidence colored persons were represented on the jury lists and served as jurors in this court. As noted above, the defendants' claim of racial discrimination rests solely upon an alleged intentional and systematic limitation of Negroes on the jury lists. To sustain this claim defendants rely in part upon the fact that no member of the indicting grand jury was a Negro. But their contention that this is evidence of discrimination is devoid of merit. It is well settled that an accused person is not entitled to a jury composed in part of persons who are members of his race. Nor is a jury of that kind guaranteed by the Constitution to a member of any race. Martin v. Texas, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed 497; Akins v. Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed. 1692; Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839. This rule, which has been applied uniformly in cases where the only accused have been members of the colored race, is with greater reason and force applicable here where ten of the accused persons are white and only one is colored. To show that Negroes were not included in a particular grand jury is not enough. There must be an actual showing of a conscious and purposeful discrimination because of race, and the burden of proving such discrimination is upon the defendants. Fay v. New York, 332 U.S. 261, 295, 67 S.Ct. 1613, 91 L.Ed. 2043. The important fact to be determined in this connection is whether the jury pool from which the grand jury was drawn fairly reflected the racial composition of the community. On this critical issue the defendants submitted no evidence. The grand jury was drawn from names placed in the jury box in March, 1952 and in prior years. Evidence as to the proportion of colored persons whose names were in the box is lacking. The defendants also offered evidence showing that on the ten grand juries that served from 1945 to 1954, inclusive, (including the indicting grand jury), one Negro served on a grand jury in each of three of those years, and no Negro served as a member of the grand jury for the other seven years. Grand juries in this district usually consist of the whole number of 23 persons. Thus, of the 230 persons who served in that capacity during the ten-year period, 3, or about 1.3%, were colored. But this cannot be considered as evidence of intentional discrimination. Here again the important fact to be determined is the racial composition of the jury pools from which the grand juries were drawn. There is no sworn testimony on this issue, and the only relevant data shown in a statistical table compiled by the defendants is so meager and inadequate as to furnish no acceptable evidential basis for a finding of the proportion of Negroes on the jury lists. This statistical table, which was designed to show the small number of persons summoned for grand juries from the Cedar-Central area of Cleveland as compared with the numbers of persons called from other areas, covers the five-year period from 1949 to 1953 inclusive. This is only one-half of the period during which the ten grand juries served. Like the tables submitted in connection with the issue of alleged discrimi-

nation against manual workers, this compilation was not offered as an exhibit and the Government was afforded no opportunity to cross-examine those who compiled it. Its accuracy is not vouched for by the oath of any witness. It is so deficient in other respects as to be entirely without probative value on the issue of the racial composition of the jury lists in the ten-year period in question. It is true that the heaviest and largest concentration of the colored population of Cleveland is in the Cedar-Central district where over 96% of the residents are Negroes. But not all of the colored population of Cleveland lives in this area. As shown by the evidence, other smaller areas of the city are predominantly colored in population. The evidence shows a tremendous growth in the colored population of these other districts of the city within recent years. For example, in Census Tract R-1, the colored population increased from 2.2% in 1940 to 82.9% in 1950. In the area covered by Census Tract R-2 the increase in colored population in the same period was from 4.2% in 1940 to 66.3% in 1950. There are several other areas in the city outside the Cedar-Central district where the proportions of colored population range between 24.7% and 82.4%. The evidence also indicates that there are substantial numbers of colored persons scattered throughout other districts of the city. The table does not show the number of persons called for petit jury service from the Cedar-Central district. It does not show the number of persons summoned for grand jury service from the other districts of the city that are predominantly colored in population. Nor does it disclose the number of persons called for grand juries from those areas of the city where the Negro population is substantial, and there is no evidence as to the number of colored persons in the jury pool who were residents of the eighteen counties outside of Cuyahoga. This statistical table is entitled to no weight. It represents but a sampling of a small segment of the district, and the fragmentary information it contains cannot be accepted as an index of the proportion of colored persons in the jury pool during the pertinent ten-year period. Grand and petit juries are drawn from the same box. By far the greater number are called for petit jury service. It is undeniable that Negroes were called for petit jury service and served in that capacity throughout the years in question. Yet no evidence as to the number of colored persons who were summoned for petit jury service has been submitted. This serious void in the evidence cannot be filled by argument based upon speculation and conjecture.

[*No Evidence of Proportions*]

Except for the testimony showing the proportion of Negroes who actually served on grand juries, there is no evidence from which an inference can be drawn as to the proportion of Negroes in the total number of persons called for jury service during the ten-year period. It is a fair estimate that more than 8,000 persons were selected for jury service during this time. It cannot be seriously considered that the proportion of colored persons in this large number of jurors is reflected accurately by the proportion shown in a mere sampling of 230 names, or less than 3% of the total number called for jury service.

[*Grand Jury Service Periods*]

There is also another factor that cannot be ruled out as a possible contributing cause of the disproportionate representation of Negroes on grand juries. Grand juries in this court serve for a year or longer and the members thereof are subject to call from time to time during this period. The various times when their services are required and the length of the respective periods of service are uncertain and unpredictable. It is essential, however, that the members of the grand jury be able readily to respond to these periodical calls of the District Attorney. Few working men are able to do this, and as a consequence the proportion of manual laborers, both white and colored, who are available for service on grand juries is diminished substantially, and this, of course, tends to limit materially the proportion of Negroes generally who are available for such service.

[*Defendants' Statistics*]

Defendants also offered as witnesses twenty-eight of the sponsors of the 1953 list of jurors whose names were placed in the jury box after the indicting grand jury was drawn. This testimony was submitted on the theory that the racial and manual labor group distributions of the 1953 list would be subtantially similar to those distributions on the lists of the pertinent prior years. The twenty-eight sponsors who testified were all non-residents of Cuyahoga

County and represented roughly about one-third of the eighty sponsors of the 1953 list. Their testimony covered about one-third of the names on the list from outside Cuyahoga County. From their testimony it appeared that the names of 368 persons were recommended by them, of which 4% were manual laborers, and slightly less than 1% were colored. This testimony is of no aid in determining the racial composition of the 1953 list or the lists for any or all of the prior years. It was unnecessary to call sponsors to determine the proportion of manual workers on the 1953 list. This fact was readily ascertainable from the information on the index cards and the sponsors' lists of recommendations. It was from these sources that the defendants computed the proportion of manual workers on the 1953 list. Nor did the testimony of the sponsors furnish any help in determining the proportion of Negroes on the 1953 list. The principal source of Negro jurors is the Cuyahoga County Jury Commissioner's list which, as the evidence shows, contains the names of large numbers of Negro jurors. The evidence does not show the proportion of Negroes obtained from this source. There were 1650 names on the 1953 list, of which 570 were from Cuyahoga County. Manifestly, a sampling of the names submitted by the sponsors from that part of the district where the proportion of Negroes is only 4.3% affords no basis for an inference as to the proportion of Negroes on the entire list, including those from Cuyahoga County, where Negroes represent more than 10% of the population and where the names of prospective jurors are selected by the clerk from the Common Pleas jury list. The manifest inadequacy of this sampling to serve as an index of the group proportions on the list is demonstrated by its application to manual laborers. The proportion of manuals in the 368 names was 4%. The proportion of manuals on the entire list as shown by defendants' computations was approximately 20%, or almost five times greater than the proportion of manuals in the sampling. Even after the 1953 list of recommendations had been reduced by more than 600 names as a result of the final selections by the jury officials, the proportion of manuals as computed by defendants was 9.8%, or almost two and one-half times greater than the proportion shown by the sampling. Thus, instead of furnishing a reliable guide to the group proportions on the jury lists of earlier years, the sampling failed completely to reflect any reasonably close approximation of those proportions on the 1953 list itself. All the sponsors of the 1953 list were white. With but two exceptions this was true of all the sponsors for the previous seven years. In all probability all the sponsors from outside Cuyahoga County during this period were members of the white race. That this was in no way related to a purpose to discriminate is clearly shown. Sponsors were selected solely with the purpose of securing a widespread geographical representation of jurors throughout the entire Eastern Division of the District. This is an appropriate method of obtaining a representative cross-section. The present system of selecting jurors was established more than thirty years ago when the colored population of the district was very small. The reputation of the fair-minded judges who approved the establishment of the system is adequate assurance that in its origin the system was free of the taint of any discriminatory design. The paramount objective of the system was and is to obtain a selection of jurors from the body of the district by giving representation to all the counties within the court's jurisdiction. The most expeditious and least expensive method of accomplishing this purpose is through the sponsor system. The sponsors are selected solely because they are respected and responsible citizens of the various communities in which they reside. For the most part, selections are made of persons who hold public office. The system has been continued without substantial change through the years. Today, sponsors are selected, as they always have been, without any consideration of their political, racial, or religious backgrounds. Except in rare instances, the jury officials are not acquainted with the sponsors. There is not the slightest suggestion in the evidence that the selection of sponsors was motivated by any discriminatory design. It is undisputed that the operation of the sponsor system in combination with the selection of jurors from the Cuyahoga County Jury Commissioner's lists, has resulted in the selection of colored persons as jurors throughout the years in question. It may be that because of the large increases in the Negro population in the district their representation has not been in proportion to the eligible members of that race. This may have been due in part to the failure of the jury officials to become fully informed about the extent of the increases in the Negro population in recent years. However,

disproportionate representation of a class on the jury lists is not the equivalent of discrimination. If it were, few indeed would be the cases where accused persons and other litigants would not have just cause for complaint because some groups or classes were not proportionately represented as jurors. Proportional representation of all the groups in our variegated population is an unattainable ideal. As was said by Mr. Justice Reed in Cassell v. Texas, 339 U.S. 282, 286, 70 S.Ct. 629, 631.

> "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation."

It was naturally to be expected that for the most part recommendations of white sponsors would be of persons of the same race. However, the evidence shows that some white sponsors recommended Negroes for jury service. It was made clearly to appear from the testimony of other sponsors that they would have recommended Negroes if it were not for the fact that jury service imposed too great a hardship on colored workmen. This was the reason given by many of the sponsors for the omission of Negroes from their lists of recommendations. Supplementing these general statements was the testimony of sponsor DeLisio of Louisville, Ohio, who described his efforts to secure four Negro workmen as jurors. He said he was told by all four of them that they would not serve because "they did not want to go up there and lose money." The testimony of these witnesses, like the statements of the judges and labor leader quoted above, illustrates the difficulty of securing jurors from the ranks of both white and colored working men. And it emphasizes the fact that considerations of hardship serve materially to diminish the proportions of both manual workers and colored persons who are presumably available for service as jurors. In United States v. Dennis, 2 Cir., 183 F.2d 201, 223, it was said that the disproportion of Negroes there shown was "adequately explained by the fact that they are among the poor groups." Similarly, the disproportion of Negroes here shown may be explained by the fact that a very large proportion of Negroes are in the manual labor group. This fact is conceded by the defendants. Indeed, it constitutes the major premise of an argument advanced by them in their brief where they say:

> "Since the Negro population is almost exclusively comprised of and linked with the category of manual workers, any substantial discrimination against manual workers inevitably results in the virtual exclusion of Negroes."

The substantial but lawful reduction of manual workers shown by the evidence is erroneously characterized in the minor premise of defendants' argument as "substantial discrimination"; but the point of their argument is that a substantial reduction in the proportion of manual workers generally unavoidably results in diminishing the Negro representation. This argument negates completely the contention that there was intentional discrimination against Negroes solely because of their race. Where a substantial reduction in manual workers on occupational or economic grounds *ipso facto* results in a limitation of Negroes on the jury lists, it cannot be true that such limitation resulted solely from racial discrimination.

> "Discrimination in this context means purposeful, systematic non-inclusion because of color." Cassell v. Texas, 339 U.S. 282, 291, 70 S.Ct. 629, 633.

Not only have the defendants failed to show such discrimination, but by their own argument they demonstrate quite convincingly that there was no racial discrimination in the selection of jurors in this court.

[*Other Cases*]

All of the cases cited by defendants are inapposite. In most of them the evidence shows total exclusion of Negroes, which concededly is not the case here. In Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; and Avery v. Georgia 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244, where there was disproportionate representation of Negroes, there was also evidence of discriminatory practices and techniques employed by the jury officials that clearly revealed their wrongful intent. These evasive practices find no counterpart in the evidence here. In Akins v. Texas, 325 U.S. 398, 65 S.Ct.

1276, 89 L.Ed. 1692, and Brown v. Allen, 344 U.S. 443, 481—482, 73 S.Ct. 397, 97 L.Ed. 469, where limited representation of Negroes on juries was involved, the claims of discrimination were denied. In each of the last two cited cases the Supreme Court found factors in the evidence that negated intentional racial discrimination.

[*Public Sentiment*]

The jury officials denied that they discriminated against Negroes. The Government was fully justified in relying upon these sworn denials of wrongful intent. There was no conceivable motive for the jury officials to discriminate. They had no personal interest in any of the litigation in this court. It was not shown that they entertained any prejudice against Negroes. Even if the contrary were true, it is safe to assume that they would not risk the severe penalties of detection by making unjust and unlawful distinctions between members of the races in their selection of jurors. It is not without significance that almost invariably cases of racial discrimination in the selection of jurors have arisen in those regions of the country with a history of inveterate opposition to political equality for Negroes. It is fair to assume that in such cases local public sentiment approved or condoned the action of the jury officials. This is in marked contrast to the situation here. The history of the people of this district is one of devoted and sacrificial service to the cause of securing and preserving equal rights for Negroes. The predominant public sentiment of the City of Cleveland and the entire district is militantly favorable to the continued preservation of those rights in full measure. It would be preposterous to suppose that in this climate of opinion the jury officials of this court would intentionally deny Negroes their constitutional right to serve on juries and invite the public condemnation that would be certain to follow the discovery of such action.

[*No Racial Discrimination*]

Defendants have failed to make out a case of racial discrimination. Their claim that the system does not insure a representative cross-section merits but brief comment. In Thiel v. Southern Pacific Co., 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181, the Supreme Court declared that a trial by jury "necessarily contemplates an impartial jury drawn from a cross-section of the community." And in defining the term 'cross-section' the court said:

> "This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups."

It has not been shown here that there was any intentional and systematic exclusion of any of the cognizable groups enumerated by the Supreme Court.

In addition to the claims set forth in their motion the defendants attack the composition of the grand jury on various grounds of alleged irregularities. While the authorities hold that irregularities not specially pleaded need not be considered, brief reference will be made to these additional complaints.

[*Claim of Disqualification*]

The contention that one of the members of the indicting grand jury was disqualified because she was recommended for jury service by the then District Attorney, is without substance. The juror in question was fully competent to serve, and her recommendation by a Government official did not disqualify her. Cf. Ippolito v. United States, 6 Cir., 108 F.2d 668; May v. United States, 84 U.S.App.D.C. 233, 175 F.2d 994. Even if she were disqualified, there would be no warrant for dismissing the indictment. Rule 6(b) (2) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides in part:

> "(2) Motion to Dismiss. * * *
>
> "An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

The record shows that all twenty-three grand jurors concurred in voting the indictment.

[*Sponsor System*]

Defendants' attack on the sponsor system as being invalid is unsupported by reason or authority. Jury officials have a wide discretion as to the manner and means of selecting names for jury service. United States v. Dennis, 2 Cir., 183 F.2d 201, 221. And it has been held specifically that the sponsor system is lawful. Walker v. United States, 8 Cir., 93 F.2d 383.

The clerk testified that pursuant to authority granted by one of the judges of this court he excused persons called for jury service who were sick or disabled and persons who had moved from the district. The clerk's testimony in this regard was:

> "Q. Well, now the letters turned over to you. What happens then? Do you review the correspondence and then send them a letter, or what? A. Yes, I review—usually there is an instruction on it if it comes from the judge and that instruction is followed. If the correspondence comes to the marshal or the clerk and the reason for excuse is, I would say, illness, death, hard of hearing, moving out of the district, or something in which no discretion is necessary, then I pass on it. If it is a matter of not wanting to serve because of business reasons, it is presented to the court for action.
>
> "Q. Is that true—is that the practice followed with reference to the letters coming into the marshal's office and those coming into the clerk's office? A. That's right."

[*Delegation by Judge*]

The defendants argue that in thus excusing persons for jury service the clerk unlawfully exercised a judicial function. Section 1863(a) of Title 28 U.S.C. provides:

> "A district judge for good cause may excuse or exclude from jury service any person called as a juror."

As shown by the evidence, there was no attempt by the judge to delegate his discretionary authority to the clerk. The testimony of the clerk is that he was authorized by the judge to honor written requests for excusals where it appeared clearly that the persons making the requests were incompetent to serve by reason of illness, deafness, or removal from the district. The defendants make no claim that they were prejudiced or harmed in any way by this procedure. Although they have made a painstaking examination of all such requests of prospective jurors and of the action of the clerk in connection therewith, the defendants have been unable to show a single instance where a juror was excused improperly. A strict construction of Section 1863(a) might require that a judge personally consider each and all requests of jurors to be excused from service. While the slight and harmless deviation from the prescribed procedure shown here may have been irregular, it was not a substantial error. It is a universally established rule that an indictment shall not be dismissed on the ground of irregularities in the drawing or impanelling of a grand jury, unless the moving party pleads and proves wherein and in what respect he was prejudiced. Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624; United States v. Parker, 3 Cir., 103 F.2d 857; Medley v. United States, 81 U.S.App.D.C. 85, 155 F.2d 857; Romney v. United States, 83 App.D.C. 150, 167 F.2d 521, 527. In United States v. Flynn, 2 Cir., 216 F.2d 354, 383-387, a court for the first time distinguished between the power of jury officials to exercise discretion in excusing persons from jury service before their names were placed in the box, and the excusing power of a judge under Section 1863, which comes into operation after jurors have been summoned for service. Prior to Flynn it was thought by so great a judge as Learned Hand that clerks might be exercising a judicial function in excusing persons from jury service on hardship grounds before their names were placed in the box. United States v. Dennis, 2 Cir., 183 F.2d 201, 219. But it was held in that case that even though the clerks were exercising a function that was exclusively judicial, there was no showing that they discriminated between classes in excusing jurors, and the court refused to dismiss the indictment. See also, United States v. Flynn, supra, 216 F.2d at page 386. In Dennis the court undoubtedly considered that if clerks exercised judicial functions in excusing persons from jury service on hardship grounds, and no prejudice resulted therefrom, the error was a harmless one and properly to be disregarded under Section 52(a) of the Federal Rules of Criminal Procedure. That Rule provides:

> "Any error, defect, irregularity or variance

which does not affect substantial rights shall be disregarded."

Here the clerk acted under the direction of the District Judge in performing duties that were largely, if not entirely, ministerial and which resulted in no prejudice to substantial rights of the defendants. There can be no doubt that Rule 52(a) governs.

Defendants' motion to dismiss the indictment on the grounds hereinabove discussed is overruled.

Defendants' challenge to the array upon the ground that there were less than 300 names of qualified persons in the jury box at the time the grand jury was drawn is considered and dealt with in a separate opinion.

TRIAL PROCEDURE

Juries—Alabama

Jeremiah REEVES, Jr., v. STATE of Alabama.

Supreme Court of Alabama, June 21, 1956, ———So.2d———.

SUMMARY: Reeves, a Negro, was indicted, tried and convicted of rape in an Alabama state court. The conviction was affirmed by the Alabama Supreme Court. The United States Supreme Court reversed the conviction on grounds of improper introduction of evidence. On a second trial the defendant moved to quash the indictment and the venire on the ground that there had been a systematic exclusion of Negroes from the juries by which he was indicted and tried. The trial court overruled the motion to quash and the defendant appealed to the Supreme Court of Alabama. That court considered evidence as to service by Negroes on grand and trial juries in the county in which the defendant was convicted and found that there was no such systematic exclusion therefrom. The Supreme Court of Alabama affirmed the conviction.

STAKELY, Justice.

Jeremiah Reeves, Jr. (appellant), was indicted by the Grand Jury of Montgomery County for the offense of rape. He was tried before a jury upon a plea of not guilty and a plea of not guilty by reason of insanity. The trial resulted in a conviction. The case was appealed to this court where it was affirmed.—Reeves v. State, 260 Ala. 66, 68 So.2d 14. On certiorari to the Supreme Court of the United States the judgment of conviction was reversed.—Reeves v. State, 348 U.S. 891, 99 L.Ed. 700, 75 Sup.Ct. 214.

[*Motions at Second Trial*]

Appellant was arraigned on November 26, 1952, and on that date pleaded not guilty and not guilty by reason of insanity. When the case came up for trial the second time on May 30, 1955, appellant made a motion for permission to withdraw his former pleas in order to attack the legality of the indictment. A motion to quash the indictment was also filed. On May 30, 1955, a motion to quash the venire drawn on May 16, 1955, was filed. Appellant also filed a motion for the appointment of a lunacy commission. Another motion to quash the indictment was also filed. Appellant also filed a motion to set aside the entire jury box and to declare it void. Appellant also made a motion to allow the public to remain in the court room during the trial and further made a motion that the public be excluded only while the prosecutrix testified. All of the aforesaid motions were denied.

Testimony was taken before the court on the motion to quash the venire on the ground of systematic exclusion of Negroes from jury duty in Montgomery County. The motion was denied and the case went to trial. The jury returned a verdict of guilty and fixed the punishment at death. Counsel moved the court to set aside the verdict and the motion was denied. The court adjudged appellant guilty and sentenced him accordingly. It is from such judgment and sentence that this appeal has been taken.

We see no reason to set out the details of the alleged rape of the prosecutrix and the identification of the appellant as the guilty party. We

have read the evidence very carefully in this regard and consider that there was clearly evidence from which the jury had the right to infer that the prosecutrix was raped and that this appellant was the one who perpetrated the act. It should be mentioned here that while on the first trial the questions of an alleged confession and inculpatory statements were raised, these questions are not involved in the instant case. In other words the entire case for the State was testimony tending to show the act which constituted the crime, with the attendant circumstances, and the identification of appellant as the party committing the crime. The defendant denied that he committed the crime and there was testimony tending to show that he was at another place at the time the alleged crime was committed.

[*Withdrawal of Pleas*]

I. On this trial of the case the appellant sought to withdraw his pleas of not guilty and not guilty by reason of insanity, which were entered on arraignment in order to permit him to attack the indictment on the ground of systematic exclusion of Negroes on the grand jury. The defendant was represented by counsel at the time the pleas were filed. The competency of counsel then representing defendant is not questioned. We find no error in the court's refusal to allow the aforesaid pleas to be withdrawn. Ordinarily an accused need not be rearraigned upon the second or subsequent trial of his case. We find that in most jurisdictions when a case has been reversed it is not necessary that the defendant be rearraigned.—Thomas v. State, 190 P. (Okla. Cr.) 711; Hamit v. State, 275 P. (Okla. Cr.) 361; Steen v. State, 242 SW (Tex. Cr.) 1047; State v. Farrell, 28 S.E.2d (N.C.) 560; State v. Hewitt, 34 S.E.2d (S.C.) 764. In Alabama the courts have placed a limitation upon this rule but this limitation is not important under the facts presented in this case. In Alabama if the indictment is changed by amendment (by agreement) or its scope by the fact that the earlier conviction acts as an acquittal of a higher degree of the offense, the better practice is to rearraign the defendant prior to the second trial.—Thomas v. State, 255 Ala. 632, 53 So.2d 340. In the case at bar the indictment has not been changed in any way and once having pleaded to the charge against him, we see no abuse of the court's discretion when the court refused to allow the defendant to reopen the pleading.

[*Waiver of Objections*]

In Alabama there are certain statutory regulations with reference to objections to an indictment. In §§ 278, 279 and 286, Title 15, Code of 1940, there are provisions setting forth the method of attacking an indictment. Section 278 provides that the proper method is by plea in abatement. Section 279 provides that in all cases such a plea in abatement must be filed before the plea to the merits. The same is true in Section 286. In Clark v. State, 239 Ala. 380, 195 So. 260, it is shown that under the procedural law of this state pleas in abatement must be filed before pleading to the merits or in bar and it is only where the court in its discretion allows pleas to the merits to be withdrawn that pleas in abatement can be filed. The principle here referred to was recently dealt with by the Supreme Court of the United States in Michel v. Louisiana, 100 L.Ed. 114, 76 S.Ct. 158. In that case the appellant was indicted on February 19, 1953, and was presented to the court for arraignment on February 23, 1953. The arraignment was continued in order that counsel might be secured. In Louisiana the defendant is required to object to the grand jury before three judicial days after its term and in any case before arraignment. The Supreme Court of the United States in holding that the three day limitation was not a denial of due process, said that a motion to quash is normally a short, simple document, easily prepared in a single afternoon. It then appeared that the term of the grand jury which indicted the defendant expired March 2, 1953. The motion to quash the indictment was filed March 9, 1953, five days after the expiration of the term of the grand jury. Counsel contended that they had not been formally appointed until March 5, 1953. The Supreme Court of Louisiana held that counsel had been appointed on March 2 and the Supreme Court of the United States refused to overturn the findings of the Louisiana Court. It should be noted that in the Michel case, supra, the ground for challenge of the indictment was the systematic exclusion of Negroes from the grand jury. The state court found that question had been waived by the failure to file the motion to quash at the proper time. The Supreme Court of the United States did not

disturb that ruling.

But there is more in this case than waiver by failure to make a timely assertion of an alleged right. As we understand the situation the question of the systematic exclusion of Negroes from the grand jury was raised on the first trial of the case and was before the Supreme Court of the United States. The reversal however by the Supreme Court of the United States was apparently based upon the erroneous introduction in evidence of the alleged confession. This is borne out by the citation of authorities on which the reversal is based. Reference to the opinion of this court in Reeves v. State, supra, as well as the record before the court on the former appeal, of which we take judicial notice, Alabama Water Co. v. City of Anniston, 227 Ala. 579, 151 So. 457, shows that the defendant filed a motion to quash the indictment by the grand jury panel on the ground that Negroes had been systematically excluded therefrom. The defendant called two members of the jury commission as his witnesses in support of the motion. This court held that there was no evidence to sustain the motion. In other words the appellant had full opportunity at that time to present the contention now made.

[*Evidence Before Jury*]

II. There is another basis which the appellant has advanced, because of which he should be allowed to withdraw his pleas of not guilty and not guilty by reason of insanity, in order that he might now attack the indictment against him. It appears to be the insistence of appellant that the indictment was based solely on evidence before the grand jury of an alleged confession obtained from appellant and since the confession has been held invalid, it is argued that there was no evidence before the grand jury on which it could lawfully return an indictment. We are not impressed with the contention here made.

On the first trial the motion to quash the indictment was based on two grounds, (1) that an invalid confession was used before the grand jury and (2) that Negroes were systematically excluded from the grand jury in Montgomery County. The court denied the motion. It is obvious, therefore, that on the first trial the indictment was attacked because of the use before the grand jury of an invalid confession, the change from the original attack now being that the invalid confession is the sole evidence on which the indictment was found. We think it is clear that the appellant had every opportunity to seek to quash the indictment for any reason growing out of the confession and that it comes too late for him now to complain of the invalidity of the indictment.—Authorities supra.

Cases such as Allen v. State, 162 Ala. 74, 50 So. 279, cited by appellant, are not in point. In this line of cases the indictment did not meet the requirements of what is now § 419, Title 14, Code of 1940. This statute applies only to seduction cases. The present case is not a seduction case.

The original indictment is not in the present record because the court did not wish to prejudice the defendant by the verdict of guilty shown on the original indictment. The record shows that by stipulation of the parties a copy of the indictment was used and that the original indictment had a list of witnesses on the back thereof. The record certainly does not indicate that the sole evidence before the grand jury when it found the indictment was the alleged confession made by the defendant. Where there is some evidence before the grand jury tending to connect the accused with the offense charged, the lack of evidence upon some essential element of the offense is not a ground for quashing the indictment.—Clark v. State, 240 Ala. 65, 197 So. 23. Furthermore, "Where an investigation was made before the grand jury which returned the indictment, the sufficiency of the evidence adduced before that body cannot be raised on a motion to quash the indictment. * * *."—Clark v. State, supra, and cases cited therein. See Costello v. United States, decided March 5, 1956 [MS.].

We say again that there was no error in the refusal of the circuit court to permit the withdrawal of the pleas so that the motion might be filed.

[*Motion to Quash Venire*]

III. The appellant filed a motion to quash the venire on the ground that Negroes were systematically excluded from the jury rolls of Montgomery County. A considerable amount of testimony was heard by the court on this motion. Appellant introduced United States Census Reports indicating that in 1950 out of 40,144 males in Montgomery County over the age of twenty-one years, 25,021 were white and 15,123 were

non-white. However, the lack of proportional representation of Negroes on the jury does not constitute discrimination under the facts in this case.—Brown v. Allen, Warden, etc., 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397; Akins v. State of Texas, 325 U.S. 398, 89 L.Ed. 1692, 65 S.Ct. 1276; Kennedy v. State, 213 S.W.2d (Tenn.) 132, cert. den. 333 U.S. 846, 92 L.Ed. 1129, 68 S.Ct. 659; People v. Price, 20 N.E.2d (Ill.) 61, cert. den. 308 U.S. 551, 84 L.Ed. 463, 60 S.Ct. 94; Thomas v. State of Texas, 29 S.Ct. 393, 212 U.S. 278, 53 L.Ed. 512.

[*Selection of Jury Lists*]

The Board of Jury Supervisors of Montgomery County is composed of the two Circuit Judges, Judge Walter B. Jones and Judge Eugene W. Carter, the Clerk of the Circuit Court, John R. Matthews, the Probate Judge, David E. Dunn and the Sheriff of Montgomery County, Sim Butler. Without going into great detail the testimony may be summarized as showing that the Board and the various members thereof had gone through the county in search of a list of qualified jurors. They obtained the list of names from the Association of Colored People as well as from the telephone directory, city directory and the voters list. The Board got names from stores or wherever people congregate and names were secured from everyone possible. A list had been obtained from the old Civic Betterment Society, civic clubs and labor organizations. Six or seven Negroes were on the venire selected to try the case at bar. There is no way of knowing from the cards taken from the jury box whether a name was that of a white or a colored man, except that the fact might be determined sometimes from the address on the card. The testimony showed that some Negroes have served on grand juries in Montgomery. The method of drawing and selection of juries was as follows: Fifty names were drawn from the jury box. These persons are summoned and the names of those appearing are put in a hat. The hat is then covered by a handkerchief and eighteen names are drawn out in open court. There was nothing on the card to distinguish white from colored persons. The board considered that it was necessary to consider both the reputation and education of prospective jurors and that an honest effort was made to see that names of competent jurors were placed in the box, whether they were white or colored. There was no discussion as to whether a man was white or colored when his name was being considered for inclusion in the jury box. Voting qualification was not necessarily the criterion for jury duty and some of the jurors were not voters. Any person wanting to be on the jury list need only contact a member of the board and his name would be considered. The board tried not to put the name of anyone on the jury list who was dead, convicted of a crime involving moral turpitude, was a drunkard, or a narcotic addict. There was testimony showing that one list of suggested names came from the head of the N.A.A.C.P. and names were received from people calling in, writing in or visiting. Social groups had not been consulted but civic clubs had been consulted and a number of representative colored people had been consulted for recommendations. One of the judges testified that whenever he saw a Negro sitting on a jury he tried to contact that Negro for more names. There was proof that the supervisors had never refused or failed to put persons on the roll by reason of his color, race or creed. There was testimony by one of the supervisors that he did not know of any venires where more than ten Negroes were listed and he did not remember whether there were any Negroes on the grand jury which indicted the appellant. He testified that the box was last refilled in January 1955, after this case had been argued before the Supreme Court of the United States. The names of leading Negroes were given who were consulted for the purpose of securing the names of Negroes to serve on the juries. There was testimony also from attorneys practicing before the bar who had more or less familiarity with the make up of juries in criminal cases and that they were accustomed in recent years to seeing Negroes serving on grand and petit juries in Montgomery County. A former sheriff and a present bailiff testified that a good many grand juries had Negroes on them and that there had been as many as four in some of them and that Negroes had been seen sitting on juries in criminal cases and that he remembered one jury with five Negroes on the jury. In short, the testimony for the State was all to the effect that there was no discrimination on account of race, color or creed when it came to selection of those to serve on juries of Montgomery County. The appellant put a number of Negroes on the stand as witnesses. These witnesses testified that they had never been called for jury duty or that they

had been called but once. Many of these witnesses were Pullman porters who are out of town a considerable part of the time. All of the persons put on the stand by the appellant, according to their testimony, had spent very little, if any time around the court house.

In the case of Thomas v. Texas, 212 U.S. 278, 53 L.Ed. 512, 29 Sup.Ct. 383, the Supreme Court of the United States in finding no evidence of discrimination stated that the evidence showed that those reponsible for obtaining jurors had fairly and honestly, attempted to carry out their duties.

The court heard all of this testimony orally before it and found that there was no discrimination against Negroes and no systematic exclusion of Negroes from service on juries in Montgomery County because of race, creed or color.

A careful consideration of the evidence satisfies us that the great weight of the evidence shows that there was no systematic exclusion of Negroes from the juries in Montgomery County. We consider that the court reached a correct conclusion and acted properly in denying the motion to quash the venire.

[*Questions Challenged*]

IV. It is insisted that the remarks of the solicitor in asking the court to present certain questions to the jury were prejudicial to the rights of appellant. The solicitor asked the court, "Inquire of the venire whether any were members of the N.A.A.C.P?". The solicitor also stated that it was his information that the case was being financed by that group. It is not necessary that the questions asked the jury venire bring forth answers which provide a ground for challenge for cause. It is proper to have questions which might bring out matters which would enable the party to select an unbiased and unprejudiced jury. Without question attorneys may wish to omit certain persons from the jury even though they might not be able to challenge the jurors for cause. Wide latitude is allowed in the questions asked voir dire in order to give counsel the opportunity for intelligent selection of the final twelve men who will make up the jury. There was no error in this ruling of the court.—Rose v. Magro, 220 Ala. 120, 124 So. 296; Burgess v. Singer Mfg. Co., 30 S.W. 1110; Redus v. State, 243 Ala. 320, 9 So.2d 914, cert. den, 63 S.Ct. 771, 318 U.S. 774, 87 L.Ed. 1143, rehearing den. 63 S.Ct. 852, 318 U.S. 802, 87 L.Ed. 1166; §§ 63, 64, Title 30, Code of 1940.

V. When the case reached the stage for taking testimony on the merits, the court excluded the general public from the trial. The court permitted the following persons to remain in the room, the defendant, counsel representing the parties, the court officers, members of the press, radio, television or other news gathering services, uniformed officers, members of the bar, defendant's pastor, members of the family and relatives of the defendant. The Alabama Constitution provides that the court may in its discretion exclude from the court room all persons not necessary in the conduct of a trial in cases of this sort.—§ 169, Constitution of Alabama of 1901. The legislature has also provided for this same exercise of discretion.—§ 320, Title 15, Code of 1940. The court was clearly not in error in its ruling in this regard. Similar acts have been upheld in many courts throughout this country. Attention is called to the following authorities in addition to the foregoing constitutional and statutory provisions hereinabove noted.—Scott v. State, 249 Ala. 304, 30 So.2d 689; Wade v. State, 207 Ala. 1, 92 So. 101; Meddington v. State, 19 Ariz. 457, 172 P. 273; Robertson v. State, 64 Fla. 437, 60 So. 118; Reagan v. United States, 202 Fed. 488; Melanson v. O'Brien, 191 Fed. 2d 963; Sawyer v. Duffy, 60 Fed. Sup. 852; Benedict v. People, 23 Colo. 126, 46 P. 637; Commonwealth v. Blondin, 324 Mass. 564; 87 N.E.2d 455; Moore v. State, 161 Ga. 648, 108 S.E. 47; People v. Swofford, 64 Cal. 223, 3 P. 809; Sallie et al. v. State, 155 Miss. 547, 124 So. 650; Baker v. Utricht, 161 Fed. 2d 304; State v. Callhan, 100 Minn. 63, 110 N.Y. 342.

VI. Upon proof that two witnesses on the former trial, who were at that time stationed at the Maxwell Field Air Base in Montgomery, Alabama, were absent from the jurisdiction of the trial court, one of them being in Minnesota and the other in England, the trial court permitted their testimony on the former trial to be read into the record. In this state upon the proper proof of the absence from the jurisdiction of witnesses who have previously given sworn testimony before a tribunal of competent jurisdiction, the earlier testimony may be introduced.—Lovejoy v. State, 32 Ala. App. 110, 22 So.2d 532, cert. den. 247 Ala. 48, 22 So.2d 537; Pruitt v. State, 92 Ala. 41, 9 So. 406; Burton v.

State, 107 Ala. 68, 18 So. 240; Lett v. State, 124 Ala. 64, 27 So. 256; Percy v. State, 125 Ala. 52, 27 So. 844; Jacobi v. State, 133 Ala. 1, 32 So. 158, appeal dismissed 23 S.Ct. 48, 187 U.S. 133, 47 L.Ed. 106; Wilson v. State, 140 Ala. 43, 37 So. 93. There was no error in this ruling of the court.

VII. There were some written charges refused the appellant. They were affirmative in nature and under the evidence in the case, were properly refused.

As is our duty, we have carefully examined the entire record to see if there was any error prejudicial to the appellant even though not called to our attention by briefs of counsel. We find no such error.

It is our conclusion that the sentence and judgment of the lower court must be upheld.

Affirmed.

All the Justices concur.

TRIAL PROCEDURE
Juries—Kentucky

Curlee BROWN v. Ross RUTTER, etc., Jury Commissioners of McCracken County, Kentucky,

United States District Court Western District, Kentucky, March 22, 1956, 139 F.Supp. 679.

SUMMARY: A Negro plaintiff in Kentucky qualified for jury service brought suit for an injunction in federal district court against jury commissioners and the county sheriff to restrain them from continuing a practice of racial discrimination in the selection of state court grand and petit jurors. The court found that such a practice of racial discrimination had existed and that plaintiff was entitled to an injunction, but deferred the granting of an injunction until a showing that the practice was being perpetuated.

FINDINGS OF FACT and CONCLUSIONS OF LAW

SHELBOURNE, District Judge.

This suit was filed February 9, 1955, by the plaintiff Curlee Brown, a member of the Negro race and a citizen and registered voter of McCracken County, Kentucky, a representative of a large class of Negroes, citizens and persons possessing all the legal qualifications for service on the grand and petit juries selected for the County.

The defendants are the three Jury Commissioners and the Sheriff of the County. The Jury Commissioners are appointed by the Judge of the McCracken Circuit Court and upon his order, designating the time and place the Commissioners meet annually and select from the current voters' records and/or the last returned tax records of the County, the names of one thousand persons qualified for jury service. The names of the persons so selected are written upon slips of paper and placed in a drum or wheel from which the names are subsequently publicly drawn by the Judge of the Court for grand and petit jury service in the Circuit Court. No person is eligible for such juror unless his name has been selected by the Commissioners, placed in the jury wheel or drum and subsequently withdrawn therefrom by the Judge, except under certain conditions specified in the statute, there devolves upon the Sheriff the duty to select bystander jurors. No juror is or can be selected except under one of these two methods.

Claiming that the defendants are maintaining a custom established by their predecessors in office, of long standing, to systematically exclude qualified Negroes from jury service by failing to place their names in the jury wheel and to summon them as bystander jurors, solely because of their race or color, the plaintiff invokes the jurisdiction of this Court under Title 28, Section 1343; Title 8, Sections 41 and 43; and, Title 18, Section 243 United States Code, praying an injunction against defendants and their successors in office from maintaining and enforcing the alleged custom and practice of excluding the qualified Negro citizen of the County from jury service, and mandatorily enjoin defendants to place the names of qualified Negroes in the jury wheel or drum and to summon them as by-stander jurors without dis-

crimination because of their race or color.

The defendants filed a motion to dismiss which was overruled and then filed answer in which, except for the allegations with respect to defendants' office status and duties, denied, either outright or because of alleged lack of knowledge, the allegations of the complaint.

From the stipulation of facts, the response to plaintiff's requests for admissions and the testimony heard at the trial, the Court makes the following—

FINDINGS OF FACT

1. The Court has jurisdiction of the parties and the subject matter involved in this action.

2. Plaintiff, Curlee Brown, is a Negro, a citizen and resident of McCracken County, Kentucky, a registered voter and legally qualified for grand and petit jury service in the Circuit Court of said County.

3. From the 1950 Federal Census the population of McCracken County was 49,137, of which 5,964 were Negroes, a large number of whom are admittedly eligible and qualified for jury service should their names be placed in the drum or wheel and selected by the Commissioners or summoned as by-standers by the Sheriff.

4. The plaintiff, Curlee Brown, is a representative of this class of Negroes and is entitled to bring this action on behalf of himself and other members of the Negro population, similarly situated and qualified.

5. From January 1, 1948 to October 25, 1955, all of the persons whose names have been drawn from the jury wheel or drum of the McCracken Circuit Court and who have been thereafter summoned for jury service and appeared for service in response to the summons have been white persons with the exception of one Negro whose name was drawn and he was summoned and appeared in response to such summons in March 1952.

6. In the year 1955, the Jury Commissioners selected and placed in the jury wheel 1000 names of persons qualified for jury service.

At the time of the trial of this case, November 1, 1955, 398 names had been withdrawn from the wheel and the persons summoned for jury service. No one so summoned was a Negro. The evidence of these facts placed the burden on the defendant, Jury Commissioners, to refute the necessary conclusion of discrimination. Reece v. Georgia, 350 U.S. 85. The mere assertion that they have not knowingly discriminated is not sufficient refutation.

7. The evidence with respect to the Sheriff indicates that in no instance, prior to the filing of this suit, did he summon as by-stander jurors or jurors for trials in the County and Quarterly Courts, Negroes except on one occasion in 1954, when a Negro defendant on trial in a criminal action raised the question of the legality of the jury panels, both grand and petit, because of the custom and practice of exclusion of Negroes therefrom, and the Circuit Judge advised the Sheriff to include Negroes in the by-standers to be summoned by him.

8. From the evidence in this case and the history of selection of juries, as reflected in the record of Hale v. Kentucky, 303 U.S. 613, it is apparent that there has existed for many years a custom and practice in McCracken County to discriminate against legally qualified Negro jurors by failing and refusing to place their names in the wheel or drum from which their names could be drawn and by failing and refusing to summon them as by-stander jurors and for members of trial juries in the Inferior Courts. This custom and practice has been maintained by the defendants in this action.

CONCLUSIONS OF LAW

In the case of Cassell v. Texas, 339 U.S. 282, (289), the Supreme Court says that it is the duty of Jury Commissioners when appointed as judicial administrative officials, to familiarize themselves with the qualifications of the eligible jurors of the County without regard to race or color, and that the jurors should be selected as individuals on the basis of individual qualifications, not as a member of a race, so that in the end an accused would have the charges against him considered by a jury in the selection of which there has been neither inclusion or exclusion because of race.

[*Selection of Jurors*]

The case of Hale v. Kentucky, 303 U.S. 613, decided in March 1938, involved the selection of

jurors in McCracken County, Kentucky. In the case it was alleged and undisputed by the prosecution that a long continued practice for fifty years or longer had prevailed in that County by which Negroes were excluded from jury service on account of their race and color and the judgment of conviction of the State Court was reversed because of the proven, systematic and arbitrary exclusion of Negroes from the jury list, on account of their race and color.

In the case of Cassell v. Texas, supra, Mr. Justice Jackson said in a dissenting opinion—

> "Qualified Negroes excluded by discrimination have available, in addition, remedies in courts of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible."

Finally, on December 5 last, the case of Amos Reece v. Georgia, 350 U.S. 85, was decided by the Supreme Court. In the County in Georgia, the 1950 census showed a white population of 55,606 and a Negro population of 6,224. It was alleged there were 534 names on the Grand Jury list and of this number only six were Negroes. None of the witnesses testifying in the case had ever heard of any Negroes serving on the Grand Jury in the County. The Clerk and the Deputy Clerk of the Court testified the jury boxes had been revised in 1952 and that there was no discrimination or systematic exclusion of Negroes from the Grand Jury list. Six Negroes were on the list but none of the witnesses had ever known of a Negro to serve on a Grand Jury in that County.

The Supreme Court said—

> "This evidence, without more, is sufficient, to make a strong showing of systematic exclusion."

And added—

> "This evidence placed the burden on the State to refute it, Patton v. Mississippi, supra, and mere assertions of public officials that there has not been discrimination will not suffice."

Valid jury selection is a constitutionally protected right.

Measured by these principles of long standing and those clearly laid down by the Supreme Court, the facts in this case point conclusively that the plaintiff is entitled to the relief in his complaint sought.

It should be said to the credit of the Jury Commissioners that in their testimony in this case, they have each and all evinced a desire and willingness to select the juries in accordance with the requirements of the law and their statements in their testimony and the statements of their Counsel in his briefs indicate that such practice and custom of exclusion of Negroes as may have existed in the past will not be repeated by them.

The Court therefore concludes that the plaintiff is entitled to the injunction sought, but defers issuing an injunction to await the outcome of the Commissioner's recent action in the selection of the jury pool for 1956.

The respect which the National and State Courts have for each other and the hesitancy to interfere with the administration of the affairs of one Court by the other, are such that the Court feels that no injunction should issue at this time until a showing is made that the custom and practice complained of here is being perpetuated.

The case will remain on the docket, with the right of either party, upon reasonable notice to apply for such writs or orders as are necessary to carry this judgment into effect.

TRIAL PROCEDURE

Juries—Oklahoma

Roy L. WYATT v. STATE of Oklahoma

Criminal Court of Appeals of Oklahoma, March 28, 1956, 296 P.2d 222.

SUMMARY: The defendant, a Negro, was tried and convicted in a state court in Oklahoma

of the offense of assault with a dangerous weapon. On appeal he alleged, as grounds for modifying his sentence, *inter alia*, that most of the witnesses in the trial as well as the prosecuting witness were Negroes and that the jury did not deliberate a sufficient length of time. The Criminal Court of Appeals of Oklahoma found no merit in this or other contentions and affirmed the conviction. A portion of the court's opinion, by POWELL, J., follows:

Roy L. Wyatt, plaintiff in error, hereinafter referred to as defendant, was in the district court of Blaine County, Oklahoma, charged by information with the crime of assault with a dangerous weapon, was tried before a jury, convicted, and the jury being unable to agree upon the punishment, the same was left to the court, who fixed the penalty at five years confinement in the State Penitentiary. The case is here on appeal.

Counsel admit in the beginning that there was sufficient evidence for submission of the case to the jury. No complaint is made as to the instructions or errors at trial, but it is asserted that the punishment assessed is excessive. It is argued that the jury did not deliberate over the issues long enough. It is pointed out that the record shows that the defendant, the prosecuting witness and all the other witnesses except two officers were colored people. Counsel urges "From a consideration of all the evidence presented by the State, and the particular facts in this case, the writer respectfully contends that the ends of justice would be met by a modification of the sentence imposed from a five year term in the penitentiary, to a short term in the county jail."

Counsel have presented an excellent and persuasive brief. But a careful, objective study of the entire record presents a different picture.

* * *

It is claimed that the jury did not deliberate long enough to give careful consideration to the instructions given by the court. We find nothing in the record to show how long the jury deliberated. This court has many times held that matters occurring in open court during the progress of a trial must be placed in the case-made by recitals certified by the judge who presided at the trial of the case before the same will be considered by the criminal court of appeals. Jackson v. State, 86 Okl.Cr. 420, 193 P.2d 895.

From the evidence in this case, it was only by providence that defendant failed to kill the prosecuting witness or others in the crowded Inn. It was only by reason of the failure of the shells to explode and his pistol to properly function that prevented him from possibly being tried for murder. The fact that all the parties involved were colored people cannot cause a relaxation of the law. The trial judge heard all the evidence and observed the witnesses, and, there being no error in the record, nothing is presented that would justify or authorize this court in interfering with the verdict and judgment appealed from.

The judgment appealed from, therefore, must be, and is, affirmed.

CONSTITUTIONAL LAW
Sedition—Kentucky

Carl BRADEN v. COMMONWEALTH of Kentucky

Court of Appeals of Kentucky, June 22, 1956, ————S.W.2d————.

SUMMARY: The defendant was indicted, tried and convicted in a state court in Kentucky for a violation of the Kentucky sedition statute. This conviction arose out of events following the sale of real property to a Negro in that state. On appeal the Court of Appeals of Kentucky reversed, on the basis of *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477. In that case the United States Supreme Court held that the federal sedition acts had pre-empted the field, and that the state act on this subject was, therefore, invalid.

SIMS, J.

The indictment in this case charged appellant, Carl Braden, and four other persons named therein, with knowingly and feloniously advo-

cating by word or writing the expediency of physical violence to bring about a political revolution to change or modify the government, Constitution and laws of the United States and of the Commonwealth of Kentucky, contrary to the statutes in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky. Upon a separate trial Carl Braden was convicted and his punishment fixed at a fine of $5000 and imprisonment for 15 years in the penitentiary. He appeals.

While this appeal was pending the United States Supreme Court handed down on April 2, 1956, an opinion in the case of Com. of Pa. v. Nelson, — U.S. —, 76 S.Ct. 477, 100 L.Ed. 415. Petition for rehearing was overruled on May 14, 1956, — U.S. —, — S.Ct. —, 100 L.Ed. 646. In that opinion the United States Supreme Court affirmed the Supreme Court of Pennsylvania in setting aside the conviction of Nelson on an indictment charging him with sedition both against the United States and the State of Pennsylvania. Com. v. Nelson, 377 Pa. 58, 104 A.2d 133. The opinion of the Supreme Court of the United States quoted from the opinion of the Supreme Court of Pennsylvania to the effect that in Nelson's trial in Pennsylvania the only evidence introduced of seditious acts was of ones directed against the United States.

[*Statutes Similar*]

The Pennsylvania statute appears in an appendix to the opinion of the Supreme Court. An examination of this statute shows it to be quite similar to our KRS 432.030, as well as KRS 432.040. Both the Pennsylvania statute and our statutes make it a felony to advocate the overthrow of the government of the United States or of the State by force and violence. In affirming the Supreme Court of Pennsylvania, which set aside Nelson's conviction, the United States Supreme Court wrote that Congress by the Smith Act of 1940, as amended in 1948, 18 U.S.C. §2385, as well as by other security acts passed by the Congress, showed an intention to occupy the field in prosecutions for sedition. We quote from the opinion of the United States Supreme Court:

> "We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law. * * *
>
> "The federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject. * * * Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem. * * *
>
> "Enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program."

In Com. v. Margaret Gilbert, —— Mass. ——, 134 N.E.2d 13, decided May 3, 1956, the indictment charged Gilbert with advocating the overthrow by force and violence of the government of Massachusetts. The Supreme Court of that State held the opinion of the United States Supreme Court in the Nelson case was controlling, and that the Congress had pre-empted to federal authorities the field in prosecutions of sedition, even though the crime was charged as having been committed only against the State. However, Chief Justice Qua said the Supreme Court of Massachusetts should not be understood as saying, "that there can never be any instance of any kind of sedition directed so exclusively against the State as to fall outside the sweep of Pennsylvania v. Nelson. If it is to be said that there can never be such an instance, it must be said elsewhere."

[*Kentucky Sedition Distinguished*]

We are in full accord with the language just quoted from the Massachusetts Supreme Court. To be certain of making ourselves clear, we now state this opinion does not foreclose the possibility of a prosecution by the Commonwealth of the crime of sedition directed exclusively against the Commonwealth of Kentucky.

It would serve no useful purpose for us to further set out the reasoning of the United States Supreme Court in the Nelson case. It

will suffice to say that we are compelled to follow the result reached by it, since there is no logical way to distinguish the instant case from the Nelson case as decided by the United States Supreme Court.

For the reasons given the judgment is reversed with directions that the indictment be dismissed as to Carl Braden.

CORPORATIONS
NAACP—Alabama

State of ALABAMA ex rel. John PATTERSON, Attorney General v. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a corporation.

Circuit Court, 15th Judical Circuit, Alabama, in equity, June 1, 1956.

SUMMARY: The Attorney General of Alabama brought suit in an Alabama state court seeking an injunction to restrain the National Association for the Advancement of Colored People as a foreign corporation from doing business in Alabama without complying with state laws respecting registration and designation of a place of business and an authorized agent. The court granted a temporary injunction. Following the order of the court in the case, the complaint of the state is reproduced.

DECREE FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION

JONES, Circuit Judge.

This cause, being submitted to the Court upon application of the complainant duly verified as required by law for a temporary restraining order and injunction as prayed for in the original complaint filed in this cause and upon consideration thereof and of the evidence offered in support thereof in the form of sworn petition and exhibits attached thereto, and the State not having elected to give bond, the Court is of the opinion same should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the respondent, its agents, servants, employees, attorneys, and all officers thereof and all persons in active concert or participation with respondent, and all persons having notice of this order, be, and they hereby are, restrained and enjoined until further orders of the Court from:

1. Conducting any further business of any description or kind of respondent within the State of Alabama; organizing further chapters of respondent within the State of Alabama; maintaining any offices of respondent within the State of Alabama.

2. Soliciting membership in respondent corporation or any local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.

3. Soliciting contributions for respondent or local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.

4. Collecting membership dues or contributions for respondent or local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.

5. Filing with the Department of Revenue and the Secretary of State of the State of Alabama any application, paper or document for the purpose of qualifying to do business within the State of Alabama.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Sheriff of Montgomery County, Alabama, or any other lawful officer of the State of Alabama, serve a copy of the petition and this order upon the respondent by service thereof upon any officer, agent or servant of respondent found within the State of Alabama.

COMPLAINT

TO THE HONORABLE JUDGES OF SAID COURT, IN EQUITY SITTING:

The State of Alabama, on the relation of John Patterson, Attorney General of the State of Alabama, respectfully represents unto your Honors as follows:

1. The Complainant, John Patterson, is the duly qualified Attorney General of the State of Alabama, and as such brings this action in the name of and for the State of Alabama.

2. The Respondent, National Association for the Advancement of Colored People, is a New York Corporation with its home office at 20 West 40th Street, New York 18, New York; copies of the certificate of incorporation and the constitution of said respondent corporation are attached hereto and made a part hereof as Exhibits A and B.

3. Respondent maintains its Southeastern Regional office at 1630 4th Avenue North, Birmingham, Alabama, with the telephone number of said office listed in the telephone directory of the City of Birmingham, Alabama. Photographs of the door and the directory in said building are hereto attached and marked Exhibits C and D.

4. Respondent maintains an office bearing its name upon the door thereof in the Masonic Temple Building, Birmingham, Alabama, with a telephone number for that office listed in the telephone directory of the City of Birmingham.

5. Respondent has hired and still employs both agents and servants to operate its offices maintained in Birmingham, Alabama, as described in paragraphs 3 and 4 above of this bill of complaint.

6. Local chapters of said Respondent corporation are organized in the State of Alabama and the County of Montgomery for the purposes set forth in respondent's certificate of incorporation attached hereto and made a part hereof as Exhibit A; and agents of respondent in the State of Alabama and County of Montgomery solicit membership, dues and contributions for said local chapters and the parent corporation.

7. Respondent has employed or otherwise paid money to one Arthurine Lucy and one Polly Meyers Hudson, members of the Negro race, to encourage and aid them to enroll as students in the University of the State of Alabama to test the policy of that institution in denying entrance as a student to persons of the Negro race.

8. Respondent has furnished legal counsel, namely, Arthur Shores of Birmingham, an attorney admitted to practice in the State of Alabama, one Thurgood Marshall, an executive officer of the Respondent corporation, and one Constance Baker Motley of Washington, D. C., a member of the National Association for the Advancement of Colored People, Legal Defense and Educational Fund, to represent said Arthurine Lucy in her proceedings against the officials and trustees of the University of Alabama in the Federal District Court for the Northern District of Alabama, to obtain admission as a student to that University.

9. Respondent has by its members and agents engaged in organizing, supporting and financing an illegal boycott by Negro residents of Montgomery, Alabama, to compel the Capital Motor Lines, a common carrier operating solely within the City and County of Montgomery, to integrate the seating arrangements in the omnibuses of said Capital Motor Lines so as to seat passengers thereon without reference to their race in contravention of a valid ordinance of the City of Montgomery, Alabama, enacted in the exercise of its police power.

10. Respondent's officers, agents, employees and members, have for years past and are presently engaged in organizing chapters of respondent's corporation in Alabama, and in Montgomery County, collecting dues therefor, soliciting contributions and expending monies, loaning personal property and giving personal property to be used to advance the aims and purposes of said respondent corporation as set forth in its certificate of incorporation.

11. Respondent corporation has never filed with the Secretary of State of Alabama a certi-

fied copy of its articles of incorporation and an instrument in writing under seal of the corporation, designating a place of business in this State, and an authorized agent residing within the State as required by Sections 192, 193 and 194 of Title 10, Code of Alabama 1940, as evidenced by certificate of the Secretary of State of Alabama attached hereto as Exhibit E.

12. Respondent corporation has been and continues to do business in the State of Alabama and in the County of Montgomery in violation of Article 12, Section 232, Constitution of Alabama 1901, and Section 194 of Title 10, Code of Alabama 1940.

13. The acts of Respondent and its continuing to do business within this State to carry out the purposes outlined in its Certificate of Incorporation without first having complied with the provisions of Section 232, Constitution of Alabama 1901, and Sections 192, 193 and 194 of Title 10, Code of Alabama 1940, are causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief to prevent such continuing unlawful and harmful conduct by Respondent.

WHEREFORE, PREMISES CONSIDERED, Your complainant prays:

1. That this Court will take jurisdiction of this bill of complaint and cause proper process to issue to the Respondent herein, requiring them to plead, answer or demur within the time required by law, or else suffer a decree pro confesso.

2. That this Court issue a temporary injunction enjoining and restraining the above named Respondent, its servants, agents and employees from further conducting its business within the State of Alabama; and further enjoin said Respondent from organizing further chapters within the State of Alabama; to dissolve all chapters of its organization hitherto organized within the State of Alabama; and further to enjoin its maintaining any office within the State of Alabama.

3. That upon a final hearing, the Court will issue a permanent injunction in accordance with the foregoing prayer for a temporary injunction, and in addition enter an order ousting the respondent corporation, National Association for the Advancement of Colored People, from organizing or controlling any chapters of the National Association for the Advancement of Colored People in this State, and from exercising any of its corporate functions in the State of Alabama.

4. And Your Complainant prays for such other, further and different relief as may be meet and just in the premises and as to which he is in equity and good conscience entitled.

/s/ JOHN PATTERSON, ATTORNEY GENERAL OF THE STATE OF ALABAMA

DEFAMATION

Libel—South Carolina

Shepard K. NASH V. H. P. HARPER et al.

Supreme Court of South Carolina, June 18, 1956, Case No. 4101.

SUMMARY: Plaintiff, counsel for two school districts in Sumter County, South Carolina, brought action for damages against individual defendants and the local chapter of the National Association For the Advancement of Colored People alleging that published statements of the defendants had impugned his honesty as an attorney. (The specific allegations are set out in the Complaint printed following the opinion in the case.) The defendants demurred to the complaint on several grounds. The trial court overruled the demurrer and the de-

fendants appealed to the South Carolina Supreme Court. That court held that the complaint stated a cause of action and that the demurrer was properly overruled.

STUKES, C. J.

The complaint in this action for damages for libel will be published herewith, omitting the caption and prayer for judgment.

The defendants demurred upon the general ground that the complaint does not state a cause of action. Upon argument, the demurrer was overruled by formal order and defendants have appealed. They made five points in the lower court, four of which have been preserved by exceptions upon appeal. We shall discuss and dispose of them in the order in which they are presented in the brief.

[*Statements in Alternative*]

It is first contended that the alleged libelous statement was in the alternative, and therefore not actionable. The following is quoted in the brief from the 4th edition of Newell, Slander & Libel, page 273: "Where a charge is made in the alternative, ordinarily both alternatives must be defamatory to render the charge actionable." Two rather old cases are cited by the author in the footnotes to sustain the text. In Blackwell vs. Smith, 8 Mo. App. 43, it was held that the following statement was not actionable: "You are a thief, or you got the book from a thief." There was the same result in Lukehart vs. Byerly, 53 Pa. 418, where it was charged by the defendant that the plaintiff had taken apples or had stolen apples or had taken apples without asking for them. We do not approve or disapprove these authorities; they are inapplicable to the facts which are alleged in the instant complaint.

Appellants omitted from the quotation in their brief the remainder of the section of Newell, which, indeed, is a part of the sentence from which they quoted; it follows:

> "* * * but if the statement taken as a whole, is such that it will not admit of any other reasonable construction except that the person referred to in such statement participated in or connived at the doing of the main act charged which was libelous, then the entire statement is libelous."

In Dennison vs. Daily News Pub. Co., Neb. 1910, 126 N.W. 764, the offending publication was, "this man either threw the bomb, hired someone to throw it, or knows who did it." The court instructed the jury that it was libelous per se, to which defendant excepted on appeal after verdict and judgment for plaintiff. The following reasoning and conclusion of the court, in overruling the exception, are applicable to the facts of the case in hand, as they are alleged in the complaint:

> "While we concede that ordinarily a charge made in the alternative might not be libelous per se, we think that the language here quoted, taken in connection with the whole article, is not susceptible of any other reasonable construction except that 'this man' either threw the bomb, hired someone to throw it, or had guilty knowledge as to who did it. In other words, we think it fairly charges that 'this man' was an active or at least a passive participant in, and connived at the throwing of that bomb. The court therefore did not err in instructing that this language constituted a libel per se."

Flowers vs. Price, 192 S.C. 373, 6 S.E. (2d) 750, was an action for slander. The offending statement was: "Someone stole thirty pounds of another man's tobacco back here in the warehouse and how do we know that you did not take his tobacco and put it on yours and carry it over to the other warehouse." Demurrer to the complaint was overruled and the following quoted with approval from Odgers on Libel and Slander (1st Am. Ed.) 116: "It is not necessary that the defendant should, in so many words, expressly state the plaintiff has committed a particular crime. * * * Any words which distinctly assume or imply the plaintiff's guilt, or raise a strong suspicion of it in the minds of the hearers, are sufficient."

Forbes vs. Johnson, 11 B. Mon. 48, 50 Ky. Rep. 48, was concerned with an alleged libel relating to a promissory note which had been held by two brothers as partners. It was generally charged by the defendants that the note had been fraudulently altered, without identifying the brother who was claimed to have made the fraudulent alteration. One of them brought the action for damages for libel and a ground of demurrer was that there was not enough in

the declaration (complaint) to justify the innuendo (colloquim) that the charges were intended to be made against the plaintiff. This ground of demurrer was overruled and the court said:

> "And if this were not so, still the charge if not confined to the plaintiff, evidently imports that the fraudulent alteration was committed by either John or James Forbes, and as it does not discriminate between them but is equally a charge against each, we are of opinion that it is in effect a charge against both, and that either and each may sue for the libel, applying the charge to himself. If each has not the right to maintain the action for words importing that one or the other of them (without further discrimination,) had been guilty of a crime, it cannot be maintained by either. And the wilful libeller might shield himself from responsibility by making his charges in the alternative against two, though in fact the mischief to each would be substantially the same as if he had charged both jointly or each separately. A charge that one or the other of two persons committed a crime, is in truth, an imputation against both, and gives to each a right of action. It was not necessary to introduce any extraneous matter in order to point the charge against the plaintiff, because the alleged libel itself contains enough to authorize its application to him."

The complaint in the case at bar contains allegations (in paragraphs 3 and 4) that plaintiff was the "official(s)" referred to in the publication and was well known to the defendants and to the public to be such.

[*Identity of Plaintiff*]

Atkinson vs. Hartley, 1 McCord 203, cited by appellants, is not in point. The witnesses, who heard the allegedly slanderous statement there, were uncertain whether the words were such as to constitute slander or were, in fact, other words which were not actionable. The distinguishing difference between that case and this is manifest.

The second assignment of error is that it does not appear upon the face of the complaint that the statement was published of and concerning plaintiff. We think it entirely untenable. The complaint alleges in paragraph 3 the professional representation of the school districts by the plaintiff as attorney, and that from prior newspaper publications it was generally known that the plaintiff, in that capacity, was the only person who was releasing the retractions. Moreover, it is alleged in the latter portion of paragraph 4 that the release to the press of the specified retraction which appears to have caused the publication of the libel of plaintiff was accompanied by a statement in the same issue of the newspaper that the release was by plaintiff as attorney for the school board.

To support an action for a libel, the plaintiff's name need not be mentioned in the writing; it is sufficient that there is a description of, or reference to, him, by which he may be known. Clark vs. Creitzburgh, 4 McCord 491.

[*Nature of Colloquium*]

It may be pointed out that the allegations of the complaint, just referred to, are in the nature of colloquim, the common law necessity for which may be obviated in proper cases by compliance by the pleader with the terms of Sec. 10-676 of the Code of 1952, which follows:

> "In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation be controverted the plaintiff shall be bound to establish on the trial that it was so published or spoken."

Appellants' third contention is that it does not appear upon the face of the complaint that the statement is capable of construction as libelous. However, we think that the inference is plain that plaintiff dishonestly worded the retractions. Referring again to the 4th edition of Newell, the following is found in Sec. 140, pages 173: "The duties of attorneys requiring integrity and knowledge of the law, any general imputation of dishonesty * * * will of course be defamatory."

An attorney brought action for libel in Pierce vs. Inter-Ocean Casualty Co., 148 S.C. 8, 145 S.E. 541, upon a published letter which con-

tained the following: "And it seems that some of these Negroes through your influence are having their policies cancelled. * * * Likewise we do not think you as attorneys should encourage policyholders to try to take advantage of this or any other insurance companies." Direction of verdict for defendant was refused and the court said: "The language used in the alleged libelous letter was of defamatory character, charging the plaintiff with dishonest dealing and unprofessional conduct, and clearly actionable." Dissenting upon other points, Mr. Justice Cothran said as to the libel: "The most important question in the case is whether the expressions used in the Cleland letter are libelous. They were made in reference to an attorney who was engaged in endeavoring to enforce the rights of her clients as she and they considered them; they charged her with practically setting up false claims for them, which she suggested and induced a breach of honest dealing and professional integrity, and unquestionably were actionable. In Davis vs. Davis, 1 Nott & McC., 290, the syllabus is: 'Any words spoken of a person in relation to his trade or profession, which tend to impair his credit, or which charge him with fraud or indirect dealing, are actionable.'"

The first sentence of the opinion in the last cited case (Davis vs. Davis) is: "The law is clear, that words, not actionable in the case of a common person, may become so, when spoken of another, in relation to the office he fills or the trade or profession which he carries on." It is followed by citations of decisions which involved plaintiffs of various trades and professions.

[*Actionable per se*]

Carwile vs. Richmond Newspapers, Inc., 196 Va. 1, 82 S.E. (2d) 588, sustained an action for libel by an attorney who had instigated a grand jury investigation of the police department for graft and corruption. The jury reported but did not return an indictment. The publication was to the effect that the vindicated officials would not say whether they would recommend action against plaintiff by the State Bar, which could request disbarment of an attorney for unprofessional conduct. We quote from the opinion: "Hence words and statements which charge an attorney at law with unethical or unprofessional conduct and which tend to injure or disgrace him in the profession are actionable per se. High vs. Supreme Lodge, etc., 214 Minn. 164, 7 N.W. (2d) 675, and the appended annotation in 144 A.L.R. 814; 33 Am.Jur., Libel and Slander, Sec. 76, p. 88; 53 C.J.S., Libel and Slander, Sec. 38, p. 85. * * * While the defamatory language does not in express terms charge the plaintiff with a breach of his professional honor, yet, when aided by the innuendo, operating within the scope of its legitimate functions, it does impute conduct tending to injure him in his profession."

Finally, appellants contend that the statement is incapable of construction as libelous concerning the plaintiff in his professional capacity as an attorney at law. Again, we find no merit.

Plaintiff's professional connection with the transaction is fully alleged in the complaint; and honesty, which it impugns, is the first requisite qualification of an attorney. Reference may be had again to the excerpt from Newell which is quoted in the above discussion of appellants' third question, and to the cited decisions in which attorneys at law were plaintiffs.

All of appellants' questions on appeal have been carefully considered and have been found to be without merit. The demurrer to the complaint was properly overruled.

Affirmed.

TAYLOR, OXNER, LEGGE and MOSS, JJ., concur.

COMPLAINT

Plaintiff, complaining of the defendants above named, alleges:

1. That the plaintiff is a resident of Sumter County, South Carolina, and is an attorney at law, practicing his profession in the City and County of Sumter, said State;

2. That the individual defendants are residents of Sumter County, South Carolina, and that the National Association for the Advancement of Colored People, Sumter Chapter is an unincorporated association, and that the individual defendants constitute the Executive Committee of the said National Association for the Advancement of Colored People, Sumter Chapter, being the executive officers of said associ-

ation, and empowered by it to transact all business for said unincorporated association;

3. That heretofore petitions were filed with the Board of Trustees of School District No. 2 and the Board of Trustees of School District No. 17, both of Sumter County, being the only two school districts in Sumter County, by some eighty (80) petitioners to the Board of Trustees of School District No. 17, and some forty (40) petitioners to School District No. 2, said petitions seeking the admission of the children of said petitioners to the white schools of School District No. 2 and of School District No. 17; that the trustees of both of said school districts employed plaintiff to represent them in connection with said petitions and to advise with them in regard thereto; that subsequent thereto many of the signers of said petitions, having become aware of the nature of the petitions signed by them, or for other reasons, came to the office of plaintiff for the purpose of withdrawing their respective names from said petitions, and that as such names were withdrawn, plaintiff, as counsel for the two said school districts of Sumter County, released to the press various letters of withdrawals signed by persons who signed said original petitions filed with said school districts, and that the name of this plaintiff as the person who released said letters requesting withdrawal of names from said petitions, was printed in the Sumter Daily Item, the only newspaper of Sumter County, and other papers in the State of South Carolina, and it was well known throughout the County of Sumter and also to the defendants that plaintiff was the only person releasing said withdrawals from said petitions for integration of the races in the public schools of Sumter County;

4. That on or about September 9, 1955, one Roland E. Blanding, who had signed the original petition for integration, came to the office of the plaintiff and, in the absence of plaintiff, caused to be written, a letter withdrawing his name from the petition submitted to the Board of Trustees of School District No. 17 for the integration of the colored and white children in the same schools, stating in said letter: "I read the petition which was presented to me very carefully and it did not request integration of the two races. The petition I signed requested the leader's from both races to talk over the problems which have arisen in an attempt to find a solution." Just prior to the signing of the said letter by the said Roland E. Blanding, requesting that his name be withdrawn from said petition for integration of the races in the white schools, the plaintiff returned to his office and saw the said Roland E. Blanding reading said letter and saw him sign the same, and subsequent thereto, this plaintiff released a copy of said letter to the press and the same was published in the Sumter Daily Item, said newspaper stating in said issue that said letter and others published therewith had been released to said paper by plaintiff, as attorney for the said School Board;

5. That subsequently the individual defendants acting for themselves and as agents and Executive Committee of the National Association for the Advancement of Colored People, Sumter County, wrote a letter to the Editor of the Sumter Daily Item, and caused said letter to be published in said newspaper, which has wide circulation in Sumter and adjoining Counties, on Tuesday afternoon, September 13, 1955, on the front page thereof, in which letter, after referring to the letter of the said Roland E. Blanding, withdrawing his name from said petition for integration of the races in the schools of Sumter County, defendants stated as follows:

> "He not only signed after reading the petition, but on one occasion directed others how to sign them. Either he is double-talking or the officials who released his statements to the press are wording these retroactions to fit the Citizens' Committees."

6. That the said article so written and caused to be published by the defendants was false, and was maliciously caused to be published by the defendants, with the purpose and intent to injure the reputation of plaintiff as an attorney at law, from which profession plaintiff derives his livelihood, and did charge and was intended to charge, and was so understood by those who read the same, that the plaintiff, as an attorney at law, did, with knowledge of the falsity thereof, willfully induce the said Roland E. Blanding to make false and untrue assertions and statements of fact, with the motive of serving the purpose of the Citizens' Committee, and that by reason thereof plaintiff has been injured in his profession as a practicing attorney;

7. That by reason of the foregoing the defendants have damaged the plaintiff, both actual and punitive, in the sum of One Hundred Twenty Thousand ($120,000.00) Dollars.

LEGISLATURES

EDUCATION

Public Schools—United States Congress (Proposed)

A bill (H.R. 11263, 84th Congress, 2d Session) has been introduced in the House of Representatives of the United States Congress by Representative Udall of Arizona relating to the construction of school facilities in areas affected by school integration and for other purposes. Other bills introduced in the Congress (S. 3931, 84th Congress, 2d Session, and H.R. 11357, 84th Congress, 2d Session) which would provide scholarships or loan programs for education, contain provisions prohibiting racial discrimination in the granting of scholarships or loans to be afforded under those bills. A draft of H.R. 11263, as referred to the Education and Labor Committee, follows:

A BILL

Relating to the construction of school facilities in areas affected by school integration, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Public Law 815, Eighty-first Congress, as amended, is amended by adding at the end thereof the following new title:

"TITLE V—SCHOOL CONSTRUCTION IN AREAS WHERE RACIAL INTEGRATION OF PUPILS AND SCHOOL SYSTEMS IS BEING CARRIED OUT

"DECLARATION OF POLICY

"SEC. 501. In recognition of the impact which a program of racial integration of pupils and school systems undertaken in compliance with the decisions and opinions of the Supreme Court of the United States in the case of Brown et al. against Board of Education of Topeka et al., delivered on May 17, 1954, and May 31, 1955, will have on the need for additional school facilities in areas where such integration is being carried out, the Congress hereby declares it to be the policy of the United States to bear the cost of constructing school facilities in such areas in the manner and to the extent provided in this title.

"PAYMENTS TO LOCAL EDUCATIONAL AGENCIES

"SEC. 502. (a) A local educational agency shall be eligible under this title for the payment provided for herein if the Commissioner of Education finds—

"(1) that the local educational agency is carrying out, or is prepared to carry out, a program of racial integration of pupils; and

"(2) that the construction of additional school facilities is needed in order to carry out such program of racial integration and maintain an average of not more than twenty-five pupils per classroom in the schools of such agency.

"(b) Each eligible local educational agency shall be entitled to receive an amount not to exceed (1) the number of children enrolled in its schools at the close of the regular school year 1953-1954 in excess of that number of children enrolled which is equal to an average of twenty-five pupils per classroom multiplied by (2) the average per-pupil cost (determined in accordance with section 210 (7) of this Act) of constructing complete school facilities in the State in which the school district of such agency is located.

"APPLICATIONS

"SEC. 503. (a) No local educational agency shall receive payment of any part of the amount to which such agency is entitled as established in section 502, except upon application therefor submitted through the appropriate State educational agency and filed with the Commissioner in accordance with regulations prescribed by

him. Each such application shall set forth a project for the construction of school facilities for such agency, in accordance with applicable provisions of section 205 (b) (1) of this Act.

"(b) The Commissioner shall approve any such application if he finds (1) that the applicable requirements of section 205 (b) (1) have been met: (2) that the educational agency has certified that no person shall be denied admission to any facility constructed under this title solely on the ground of race; (3) that the cost of the project does not exceed so much of the maximum amount which such agency is entitled to receive under section 502 as has not been expended or obligated for payment of the cost of projects of such agency heretofore approved; (4) after consultation with the local and State educational agencies, that the project with respect to which such application is made is not inconsistent with overall State plans for the construction of school facilities; and (5) that there are sufficient Federal funds available to pay the cost of such project and of all other projects for which Federal funds have not already been obligated and which, under section 506, have a higher priority.

"(c) No application under this title shall be disapproved in whole or in part until the Commissioner has afforded the local educational agency reasonable notice and opportunity for hearing.

"CERTIFICATION AND PAYMENT

"SEC. 504. (a) Upon approving the application of any local educational agency under section 503 (b), the Commissioner shall certify to the Secretary of the Treasury for payment to such agency an amount equal to 10 per centum of the cost of the project with respect to which such application was made. After final drawings and specifications have been approved by the Commissioner and the construction contract has been entered into, the Commissioner shall certify to the Secretary of the Treasury for payment to such agency, in accordance with regulations prescribed by him and at such time and in such installments as may be reasonable, the remainder of the cost of the project.

"(b) The Secretary of the Treasury shall make payments to each local educational agency in accordance with the certification of the Commissioner. Any funds paid to a local educational agency and not expended for the purposes for which paid shall be repaid into the Treasury of the United States.

"WITHHOLDING OF PAYMENTS

"SEC. 505. Whenever the Commissioner, after reasonable notice and opportunity for hearing to a local educational agency, finds (1) that there is a substantial failure to comply with the drawings and specifications for the project, (2) that any funds paid to a local educational agency under this title have been diverted from the purposes for which paid, or (3) that any assurance given in an application is not being or cannot be carried out, the Commissioner shall forthwith notify such agency that no further payment will be made under this title with respect to such agency until there is no longer any failure to comply or the diversion or default has been corrected or, if compliance or correction is impossible, until such agency repays or arranges for the repayment of Federal moneys which have been diverted or improperly expended.

"ESTABLISHMENT OF PRIORITIES

"SEC. 506. The Commissioner shall from time to time set dates, the last of which shall be not later than July 1, 1959, by which applications for payments under this title with respect to construction projects must be filed. If the funds appropriated under this title and remaining available on any such date for payment to local educational agencies are less than the cost of the projects with respect to which applications have been filed prior to such date (and for which funds under this title have not already been obligated), the Commissioner shall by regulation prescribe an order of priority, based on relative urgency of need, for approval of such applications. Only applications meeting the conditions for approval under this title shall be considered applications for purposes of the preceding sentence.

"AUTHORIZATION

"SEC. 507. There are hereby authorized to be appropriated for the fiscal year ending June 30, 1957, and for each of the three succeeding fiscal years, such sums as may be necessary to carry out the provisions of this title, including the administration thereof.

EDUCATION
Public Schools—Alabama

Act No. 117, April 14, 1956, of the Second Special Session of the Alabama Legislature, 1956, makes revisions in the state's laws with respect to attendance at schools and the authority of school boards.

AN ACT

To amend Sections 93, 167, and 297 of Title 52, Code of Alabama (1940), which provide for the attendance of children at school.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 93 of Title 52, Code of Alabama (1940) is amended to read as follows:

"Section 93. The county board of education shall provide free schools for all children over six years of age, and shall provide separate schools for white and colored children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race."

Section 2. Section 167 of Title 52, Code of Alabama (1940) is amended to read as follows:

"Section 167. The city board of education shall determine, on recommendation of the city superintendent of schools, and subject to the provisions of this title, the educational policy of the city, and shall prescribe rules and regulations for the conduct and management of the city schools. The board shall provide free schools for all children over six years of age, and shall provide separate schools for white and colored children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race."

Section 3. Section 297 of Title 52, Code of Alabama (1940) is amended to read as follows:

"Section 297. Every child between the ages of seven and sixteen years shall be required to attend a public school, private school, denominational school, parochial school, or be instructed by a competent private tutor, for the entire length of the school term in every scholastic year. Admission to public school shall be on an individual basis, on application of the parents, legal custodian or guardian of the child, to the local board of education, at the beginning of each school year, under such rules and regulations as the board may prescribe. Each child, through his parents, legal custodian or guardian, shall have the right to choose whether or not he shall attend a school provided for members of his own race.

Section 4. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 5. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

EDUCATION
Public Schools—Arkansas

On February 24, 1956, a special committee appointed by the Governor of Arkansas to make recommendations for official action in Arkansas with respect to the racial integration of public schools made its report to the Governor. That report follows:

Little Rock, Arkansas
February 24, 1956

TO THE HONORABLE ORVAL E. FAUBUS
GOVERNOR OF ARKANSAS

The undersigned Committee was requested recently by you to make a study of official action being taken by the State of Virginia as a result of the United States Supreme Court decisions relating to racial segregation in public schools.

The Committee was requested by you to report the results of its study and to make such recommendations for official action in Arkansas

as the Committee considered appropriate at this time as a result of its study.

Pursuant to its directions from you, the Committee conferred on February 14, 1956 in the Governor's Reception Room in Richmond, Virginia with the following officials of the State of Virginia: Honorable Thomas B. Stanley, Governor of Virginia; Honorable J. Lindsay Almond, Jr., Attorney General of Virginia; Senator Garland Gray, Chairman of the Commission on Public Education of Virginia; Senator Harry B. Davis, Vice-Chairman of the Commission; Senator Robert Y. Button, a member of the Commission; and David Mays, Counsel for the Commission.

At the conference on February 14, the officials of Virginia supplied to your Committee all available official documents relating to the subject under discussion. The problem of racial segregation insofar as it affects the public schools of Virginia was discussed at length at the conference.

On February 15 your Committee attended another conference in Richmond on the same subject with the following officials of Virginia: Attorney General J. Lindsay Almond, Jr.; Senator Garland Gray; Senator Curry Carter, a member of the Gray Commission; and Honorable Henry T. Wickham, Assistant Counsel for the Commission. The Committee also conferred at considerable length with Honorable Dowell J. Howard, Superintendent of Public Instruction for the State of Virginia, who has devoted approximately 36 years to the cause of public education in Virginia.

The Committee wishes to give public expression through you of its appreciation for the most cordial reception and unlimited co-operation extended to your Committee by Governor Stanley and the other officials of the State of Virginia. Without such co-operation, the study would have been much more difficult and far less pleasant.

This report of the Committee is necessarily an interim report because certain features of the study will require a more detailed examination of the Arkansas School Laws as compared with the corresponding laws of Virginia. The final report of the Committee will be submitted to you as expeditiously as time and the importance of the subject matter will permit.

This report of the Committee is divided into two sections and should be studied in that light. First, the Committee reports to you the status of the public school problem as it now exists in Virginia but related only to the problem of racial segregation in public schools. Second, the Committee respectfully submits for your consideration its recommendations for such action in Arkansas as the Committee considers necessary and appropriate at this time.

Background of Virginia Plan

On May 17, 1954 the United States Supreme Court rendered its famous decision in what has come to be known as "The School Segregation Cases". Among the five cases involved, there was *Davis v. County School Board of Prince Edward County, Virginia,* which is generally referred to as "the Virginia Case", to distinguish it from the other four companion cases decided by the Court on May 17, 1954. In its unanimous opinion written by Chief Justice Warren, the Court said:

> "We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs (the Negro children seeking admission to segregated schools) and others similiarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown v. Board of Education,* 74 S.Ct. 686.

Having thus declared the State school segregation statutes to be invalid, the Court added:

> "Because these are class actions, because of the wide applicability of the decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of great complexity. . . We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are

requested to present further argument on Questions 4 and 5 previously propounded by the Court for reargument this Term."

Questions 4 and 5 referred to by the Court for further argument were as follows:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic districting, Negro children should *forthwith* be admitted to schools *of their choice*, or

"(b) may this Court, in the exercise of its equity powers, permit *an effective gradual adjustment* to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which Questions 4(a) and (b) are based, and assuming further that this Court will exercise the equity powers to the end described in Question 4(b),

"(a) should the Court formulate detailed decrees in this case;

"(b) if so, what specific issues should the decrees reach;

"(c) should this Court remand to the Courts of first instance with directions to frame decrees in this case and, if so, what general directions should the Courts of first instance follow in arriving at the specific terms of more detailed decrees?"

Pursuant to the request for reargument, the State of Virginia and other States, including the State of Arkansas, filed briefs stating their views as to the proper answers to Questions 4 and 5 which are quoted above. The issues presented by the Court's Questions 4 and 5 were argued orally before the Court beginning on April 11, 1955.

On May 31, 1955 the Court rendered its final opinion and decrees in all five of the pending cases, including the Virginia case. *Brown v. Board of Education*, 75 S.Ct. Rep. 753. In its final opinion of May 31, 1955, the Court said:

"Full implementation of these constitutional principles may require solution of varied local problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the actions of school authorities constitutes *good faith implementation* of the governing constitutional principles."

The Court then pointed out:

"At stake is the personal interest of the plaintiffs (the Negro children) in admission to public schools *as soon as practicable* on a non-discriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954 decisions. Courts of equity may properly take into account the public interest in elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

The Court then concluded its directions to the trial courts from which the cases originated as follows:

"While giving weight to these public and private considerations, the Court will require that the defendants (school directors) make a *prompt and reasonable start toward* full compliance with our May 17, 1954 ruling. Once a start has been made, the Courts may find that additional time is necessary to carry out the ruling in an effective manner. . . To that end, the Courts may consider problems relating to administration arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts, and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."

The lower courts were then ordered "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with *all deliberate speed* the parties to these cases."

The Virginia case (*Davis v. County School*

Board of Prince Edward County) and the consolidated South Carolina case *(Briggs v. Elliott)* having been remanded back to the federal district courts of Virginia and South Carolina respectively (both of which States are in the United States Court of Appeals for the 4th Circuit), the South Carolina Federal District Court was the first Court to act pursuant to the May 17, 1955 decree of the Supreme Court. It became necessary for the South Carolina Court to interpret the directions contained in the Supreme Court decree. In doing so, the South Carolina three-judge District Court, composed of Federal Circuit Judges Parker and Dobie and District Judge Timmerman, used the following very significant language:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it (the state) maintains. This, under the decision of the Supreme Court, the State may not do directly or indirectly. . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. *The Constitution, in other words, does not require integration.* It merely forbids discrimination . . . The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

Based upon its interpretation of the Supreme Court decision, the three-judge District Court of South Carolina ordered "that the defendants be and they are hereby restrained and enjoined from refusing on account of race to admit to any school under their supervision any child qualified to enter such school, from and after such time as they may have made necessary arrangements for admission of children to such schools on a non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this case". See *Briggs v. Elliott,* 132 Fed. Supp. 776 (July 15, 1955).

A similar order was entered by the three-judge Federal District Court of Virginia in the case of *Davis v. County School Board of Prince Edward County.*

Following the Supreme Court decision of May 17, 1954 in the Virginia case, the Honorable Thomas B. Stanley, Governor of Virginia, on August 30, 1954, appointed a commission designated as the "Commission On Public Education." The Commission was composed of 32 members, all of whom were members of the General Assembly of the State of Virginia. Senator Garland Gray was designated as Chairman of the Commission. The Commission is popularly known as "The Gray Commission" and it will be given that designation in this report.

The Gray Commission was "instructed to examine the effect of the decision of the Supreme Court of the United States in the school segregation cases decided May 17, 1954 and to make such recommendations as may be deemed proper". *Commission's Report of November 11, 1955. Page 1.*

The Commission began immediately with its consideration and study of the problems before it, but it could make little more than a preliminary study until after the final Supreme Court decree was rendered on May 31, 1955. The Commission held many meetings "including a lengthy public hearing, wherein many representatives of both races expressed their views".

After the public hearing which was held on November 15, 1954 and which was attended by more than 2,000 persons, the Commission on January 19, 1955 filed with the Governor its first interim report. *Appendix 1 to Commission's Report of November 11, 1955.* In its first interim report, the Gray Commission said:

> "As the record of the public hearing shows, the great majority of those appearing there expressed opposition to integration and requested those in authority to afford them relief from the effects which they anticipated would result therefrom.
>
> "The testimony at the hearing brought into sharp focus the nature and intensity of the feeling as to the effect that integration would have on the public school system. Not only did the majority of persons speaking at the hearing feel that integration

would lead to the abolition or destruction of the public school system, but some groups indicated through their spokesmen that they preferred to see the public school system abandoned if the only alternative was integration."

The Commission further reported that the evidence before the Commission has "convinced the Commission that the overwhelming majority of the people of Virginia are not only opposed to integration of white and Negro children of this State, but are firmly convinced that integration of the public school system without due regard to the convictions of the majority of the people and without regard to local conditions would virtually destroy or seriously impair the public system in many sections in Virginia".

Following the decision of the Supreme Court of May 31, 1955, the Gray Commission met on June 8, 1955 "for the specific purpose of considering the effects of the Supreme Court's latest enunciation concerning the public school system in Virginia". *(Commission's Second Interim Report dated June 10, 1955).*

The Commission filed with the Governor of Virginia its second interim report on June 10, 1955 in which the Commission reported:

"The plans the Commission has under consideration, necessitated by the decision of the Supreme Court of the United States, require numerous, involved and complex changes in the present laws of Virginia . . . Time and exhaustive study are required for the formulation and enactment of legislation if the interest and welfare of the people of both races, the protection of the status of the teachers, and the financial problems involved are to receive constructive attention."

The Commission's report of June 10, 1955 concluded with the following recommendation:

"In the circumstances it is the recommendation of this Commission that your Excellency and the State Board of Education declare that it is the policy of the State to continue schools through the year 1955-1956 as presently operated. Further, it is the judgment of this Commission that an adjustment at this time to a school system not based on race would not be practicable or feasible from an administrative standpoint or otherwise."

The Virginia Plan

The final report of the Gray Commission was filed with the Governor on November 11, 1955. The report contains certain specific recommendations for changes in the constitutional and statutory provisions of Virginia relating to public schools. The report does not contain any specific mention of the so-called "Doctrine of Interposition" but it does contain an emphatic statement that the 1954 decision of the Supreme Court "transcends the matter of segregation in education" and that, as a result of that decision, "the most fundamental of the rights of the states and of their citizens exist by the Court's sufferance and that the law of the land is whatever the Court may determine it to be by the process of judicial legislation". It may be said, therefore, that the Virginia Plan is evolved from the studies and reports of the Gray Commission.

Based upon the reports of the Gray Commission and studies made by other State officials, the Virginia Plan may be divided into the following general topics:

1. Invoking the Doctrine of Interposition.

2. Constitutional amendment and supplementary legislation providing for tuition grants for private school attendance.

3. Legislative action broadening the powers of school boards in the assignment of pupils and teachers in the public schools.

4. Other miscellaneous and related statutory changes.

Some portions of the Virginia Plan have been put in operation while some portions are still in process of development, as will be discussed under each of the appropriate topics. The foregoing general topics will be discussed separately in this report.

Doctrine of Interposition

The Doctrine of Interposition is based upon the asserted constitutional principle "that by compact under the style and title of a Constitution for the United States and by amendments thereto, they constitute a general government for special purposes delegated to the government certain definite powers, reserving each state to itself, the residuary mass of right to their own self-government; and that whenever the General Government assumes undelegated powers, its acts are unauthoritative, void and of no force". *(Kentucky Resolution of November 16, 1798).*

The original Constitution of the United States became effective March 3, 1789. The first ten amendments to the Constitution were proposed to the legislatures of the several states on September 25, 1789, and these amendments were ratified by the State of Virginia on December 15, 1791. Amendment No. 9 to the Constitution provides:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Amendment No. 10 to the Constitution provides:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states, or to the people."

The Federal Government, acting through its Supreme Court decision of May 17, 1954, has asserted that Virginia and other states, by their ratification of the Fourteenth Amendment of 1868 prohibited unto the state the power to maintain racially separate public schools. On the other hand, the State of Virginia, acting through its General Assembly, has asserted that the State has never surrendered such power.

The issue of contested and conflicting powers having been thus presented, the General Assembly of the State of Virginia, on February 1, 1956, adopted Senate Joint Resolution No. 3 (known as the Interposition Resolution) by the terms of which the State has undertaken to interpose State sovereignty as against the asserted power of the Federal Government.

Basically, the Virginia Interposition Resolution does, or purports to do, three things:

1. The General Assembly of Virginia "appeals to her sister states . . . and respectfully requests them to join her in taking appropriate steps, pursuant to Article V of the Constitution, by which an amendment designed to settle the issue of contested power here asserted, may be proposed to all the states".

2. The General Assembly of Virginia pledges its "firm intention to take all appropriate measures honorably, legally and constitutionally available to us, to resist the illegal encroachment upon our sovereign powers, and to urge upon our sister states . . . their prompt and deliberate efforts to check this and further encroachments by the Supreme Court, through judicial legislation, upon the reserved powers of the States."

Much has been written and still more has been said on the subject of "Interposition". An academic discussion of the history and the legal, political and moral effect of interposition is beyond the scope of this report. It would unduly burden this report to cite and discuss the numerous instances in which states have invoked, or attempted to invoke, the doctrine. There is, however, one concrete example wherein the doctrine was invoked and accomplished the results toward which it was directed.

In the case of *Chisholm v. Georgia, 1 L.Ed. 440,* the United States Supreme Court held that the State of Georgia could be sued for a debt in the Supreme Court by individual citizens of another state. It was contended by the State of Georgia that the judicial power of the federal courts under the Federal Constitution did not extend to actions by citizens against a state and that the Supreme Court had exceeded its power in declaring to the contrary. Thereupon the Georgia Legislature invoked the doctrine of interposition by calling upon the other states to revoke the Supreme Court decision. As a direct result of the interposition by Georgia, Amendment No. 11 to the Federal Constitution was declared adopted on January 8, 1798. Amendment No. 11 revoked the judicial legislation as declared by the Supreme Court in *Chisholm v. Georgia* by providing:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted

against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

It has been pointed out that the Virginia Interposition Resolution was adopted by the General Assembly of Virginia on February 1, 1956. On February 6, 1956, a member of the General Assembly addressed a letter to the Attorney General of Virginia requesting an official opinion "on the scope, effect, and legal efficacy" of the Resolution. In response to this request, the Attorney General issued his official opinion which is dated February 14, 1956. The opinion contained the following statements, among others:

"The Resolution is not one of nullification. Its plain terms negate the concept of nullification. The Court embraced that doctrine (of nullification) in its most far-reaching implications when it nullified basic provisions of the Constitution of the United States. The Resolution is one of interposition with resort to constitutional process for relief."

"The Resolution does not purport to operate as a suspension of or supersedeas to the decision (in the Virginia case) as it relates to the defendants in the Federal District Court."

"The Resolution is not a legislative enactment having the force and effect of law . . . representing the all but unanimous resolve of the elected representatives of the people, it imposes upon all officials, State and local, the duty to observe 'all appropriate measures honorably, legally, and constitutionally available to resist this illegal encroachment upon the sovereign powers of the State.'"

"The Resolution under consideration is a declaration of right invoking and interposing the sovereignty of the State against the exercise of powers seized in defiance of the creating compact; powers never surrendered by the remotest implication but expressly reserved and vitally essential to the separate and independent autonomy of the States. It is an appeal of last resort against a deliberate and palpable encroachment trangressing the Constitution."

The Attorney General further stated, in answer to questions, that it was not within the powers of the General Assembly or the people of Virginia to legally nullify, in whole or in part, the 1954 decision of the Supreme Court or to suspend for any period of time the enforcement of the decision in Virginia.

Tuition Grants

In the final report of the Gray Commission dated November 11, 1955, it is stated:

"The Commission has been confronted with the problem of continuing a public school system and at the same time making provision for localities wherein public schools are abandoned, and providing educational opportunities for children whose parents will not send them to integrated schools."

As a solution to the problem thus stated, the Gray Commission proposed a series of enactments which would permit the successful operation of private elementary and secondary schools for the accommodation of pupils, both white and Negro, whose parents do not choose to send their children to racially mixed schools. It is assumed, of course, that these private schools will be operated strictly on a segregated basis. The proposed private schools will be supported by tuition or contributions paid to the operators of the private schools. It was apparent to the Commission that many of the parents whose children now attend tax supported public schools would not be financially able to pay tuition for their children to attend private schools.

The Gray Commission, therefore, undertook to work out a plan by which parents would be supplied with funds with which to pay a part, if not all, of the tuition charged by the private schools.

In order to provide legally for the tuition grants which would, in turn, be used to support the private schools, the Commission recommended the following procedure:

1. An amendment to the Virginia Constitution. On November 7, 1955, the Supreme Court of Appeals of Virginia in the case of *Almond* v.

Day held, among other things, that Section 141 of the Constitution of Virginia prohibits the appropriation of public funds for the payment of tuition, institutional fees and other expenses of pupils who may desire to attend private schools. It followed from this decision that Section 141 of the Virginia Constitution would have to be repealed or amended before any tuition grants from public funds could be used for attendance in private schools.

If the recommendations of the Gray Commission are ultimately approved by a vote of the people of Virginia, Section 141 of the Constitution will be amended so as to provide substantially as follows:

> "To permit the General Assembly and the governing bodies of the several counties, cities, and towns to appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate, and graduate education of Virginia students in public and *nonsectarian private schools* and those institutions of learning in addition to those owned or exclusively controlled by the State or any such county, city, or town."

Thus, State funds and funds raised by local taxation for school purposes could, insofar as the laws of Virginia are concerned, be appropriated for payment of tuition in private schools.

2. The Constitution having been properly amended as above indicated, the Commission recommends a legislative enactment authorizing localities "To raise sums of money by a tax on property to be expended by local school authorities for educational purposes including cost of transportation, and to receive and expend State aid for the same purposes." It is proposed that the educational funds could be expended by the local school board for the payment of tuition grants for elementary or secondary school education and could, in the discretion of the board, be expended for transportation costs.

3. There would be a legislative enactment which would require school budgets to "Include amounts sufficient for the payment of tuition grants and transportation costs under certain circumstances; that local governing bodies be authorized to raise money for such purposes; that provision be made for the expenditure of such funds."

The Commission recommends that the law provide that each tuition grant shall be in the amount "Necessary for the education of the child, provided, however, that in no event would such grant exceed the total cost of operation per pupil in average daily attendance in the public school for the locality making such grant as determined from the preceding school year by the Superintendent of Public Instruction."

4. The Commission made the further recommendation as follows:

> "The Virginia Supplemental Retirement Act should be broadened to provide for the retirement of school teachers if such teachers be employed by a corporation organized for the purpose of operating a private school after the effective date of the enactment of legislation recommended by this report."

Although the report of the Gray Commission is not specific on the point, it is understood that under the private school tuition plan a teacher transferring from a public school to a private school would not lose any accumulated retirement benefits which had accrued at the time of transfer to the private school. After such transfer, however, future teacher retirement benefits would have to be provided for by the private school to which the teacher is attached.

The various proposed legislative enactments for implementing the private school tuition plan as recommended by the Gray Commission have not been made public at the present time. No evaluation as to the exact method of operation under the plan or as to its efficacy in solving the segregation problem or as to whether it comes within the prohibition of the 14th Amendment as now construed by the Supreme Court can be made until the provisions of the various proposed implementing acts have been made public and carefully analyzed.

Assignment Plan

The so-called "Assignment Plan" of Virginia contemplates legislative enactments authorizing school boards to assign pupils to particular schools and to provide for appeals from decisions of the local boards relating to assignment.

No proposed legislative act incorporating the

assignment plan has been presented to the Virginia General Assembly; nor has such a proposed act been otherwise made public. The Gray Commission, however, states in its report that the proposed act "Would be designed to give localities broad discretion in the assignment of pupils in public schools." The Gray Commission further states with reference to the provisions of the proposed Assignment Act:

> "Assignments would be based upon the welfare of the particular child as well as the welfare and best interest of all other pupils attending a particular school. The school board should be authorized to take into consideration such factors as availability of facilities, health, aptitude of the child, and the availability of transportation."

A very important feature of the proposed assignment legislation would be the provisions for an administrative remedy for correcting any improper assignments by the local board. The proposed act would provide:

> "Any parent, guardian, or other person having custody of a child, who objects to the assignment of his child to a particular school under the provisions of the Act should have the right to make application within 15 days after the giving of the notice of the particular assignment to the local school board for a review of the action. . . An appeal, if taken, should be permitted from the final order of the school board within 15 days. The appeal would be to the Circuit or Corporation Court. . . If either party be aggrieved by the Order of the Court, an appeal should be permitted to the Supreme Court of Appeals of Virginia."

The following is submitted as an illustration as to how the proposed Assignment Plan would operate in Virginia under this legislation:

School Board "A" now operates School "X" exclusively for white children and School "Y" for Negro children. At present the assignments to School "X" and School "Y" are based entirely on race under the Virginia constitutional and statutory segregation laws. After the enactment of the proposed assignment law and by reason of the 1954 Supreme Court decision the assignment of pupils would no longer be based on race. On the contrary, the assignment would be based "Upon the welfare of the particular child as well as the welfare and best interest of all other pupils attending a particular school." The question of the race of a particular child would not be a deciding or controlling factor as it was under the former laws. The school board would undoubtedly have broad discretion in making the assignments—in fact, the only limitation on their discretion would be that the assignment must not result in discrimination based entirely on race.

If a particular child (who happens to be a Negro child) is assigned to School "Y" (the school now being operated exclusively for Negroes) and the parent of such child objects to the assignment of such child to School "Y", contending that the assignment by the board was based solely on race and, therefore, discriminatory, such parent and child would have to pursue the administrative remedy by appeal as set forth in the act before resort could be had to the Federal Court for injunctive or other relief based on discrimination. In other words, the State Agencies and Courts would first pass on the question as to the factual basis for the assignment. It is submitted that if the assignment is sustained by the State Agencies as not being based solely on race then such finding would, and should, carry considerable weight, if not binding weight, if the same factual question be presented ultimately to a Federal Court in injunctive proceedings.

Miscellaneous Proposed Acts

The Gray Commission recommended additional legislative action as follows:

1. The existing Virginia compulsory school attendance law should be amended so as to provide that no child be required to attend an integrated school.

2. Local school boards should be vested with authority to employ teachers and assign them to a particular school.

3. The office of the Attorney General should be authorized to render certain services to local school boards.

4. All existing school laws conflicting with the laws proposed by the Gray Commission should be repealed.

It is repeated here that none of the proposed bills have been made available to the public or to this committee.

Committee Conclusions and Recommendations

1. *Interposition.* The Committee is in full and complete accord with the principles set out in the Virginia Interposition Resolution. (Senate Joint Resolution 3, adopted February 1, 1956). Specifically, the Committee believes that the State of Arkansas, by whatever measures may be most appropriate and effective, should affirm the following declaration of principle set out in the Virginia Resolution:—

> "That whenever the Federal Government attempts the deliberate, palpable, and dangerous exercise of powers not granted to it, the States who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for preserving the authorities, rights, and liberties appertaining to them."

It is the opinion of the Committee that the emergency existing in Arkansas as the direct result of the Supreme Court decision of May 17, 1954, requires that appropriate steps be taken by which the will of the majority of the people of Arkansas can be officially determined.

To that end the Committee recommends the enactment of an appropriate law, either by the General Assembly of Arkansas or by an Act initiated by the People of Arkansas under Amendment No. 7 to the Constitution of Arkansas, by the terms of which enactment the People of Arkansas would be given an opportunity either by direct vote of the people or by the vote of their representatives in the General Assembly to affirm or reject the principles set forth in the Virginia Resolution and authorizing the State to resort to a means for relief set forth in that Resolution.

2. *Tuition Grants.* As has already been stated, the Committee has not completed its study of the Virginia Tuition Grant Legislative Program insofar as such plan would affect the operation of the public schools in Arkansas.

In this connection, the Committee is particularly concerned with the following problems:

(a) Would the operation of segregated private schools under the proposed Virginia Tuition Plan jeopardize the present standard of the continued improvement thereof of the education of school children of Arkansas to any extent.

(b) What effect would the operation of the private schools under the Tuition Grant Plan have on the supply of qualified teachers and on the existing teacher retirement laws of Arkansas.

(c) Would the operation of the Tuition Grant Plan have the legal effect of converting the private segregated schools into public schools and therefore bringing them within the prohibition of the 14th Amendment by reason of the so-called "State Instrumentality Concept" of State action as exemplified by the Supreme Court decisions in *Nixon v. Condon,* 286 U.S 73 (1932); *Smith v. Allwright,* 321 U.S. 649 (1944); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Barrows v. Jackson,* 346 U.S. 249 (1953) and other decisions of similar import.

(d) Would the Plan when put in operation require a constitutional amendment repealing that portion of Article 14, Section 1 of the Arkansas Constitution which provides that "The State shall ever maintain a general, suitable, and efficient system of free schools whereby all persons in the State between the ages of 6 and 21 years may receive gratuitous instructions."

The Committee will make a further report on this topic upon completion of its studies if such report is desired.

3. *Assignment Plan.* The Committee recommends that the General Assembly of Arkansas enact a pupil assignment law along the general lines recommended by the Gray Commission and as exemplified by the North Carolina Act of 1955 entitled "An Act to Provide for the Enrollment of Pupils in Public Schools," which was in operation at the beginning of the 1955-56 session of the public schools in North Carolina.

It is significant that the North Carolina assignment law has been approved and upheld in the recent decision of *Carson v. Board of Education of McDowell County,* 227 Fed.2d 789 (Court of Appeals, 4th Circuit. Decided December 1, 1955). That case was an action by Negro chil-

dren against the County Board of Education in the Federal District Court of North Carolina to require that provision be made for them of educational facilities equal to those provided for white children and to obtain injunctive relief against discrimination. The complaint was filed prior to the decision of the Supreme Court of May 17, 1954. The trial court dismissed the action on the ground that the May 17, 1954, decision of the Supreme Court had made inappropriate the relief prayed for in the complaint.

The Court of Appeals held that the Negro children were entitled to have the discrimination removed and to have their rights declared. The Court further held, however, that the lower court should not take any action whatever in the case until the Negro children had exhausted the administrative remedy provided for in the North Carolina assignment act. In so holding the Court of Appeals said:

> "In further consideration of the case, however, the District Judge should give consideration not merely to the decision of the Supreme Court but also to the subsequent legislation of the State of North Carolina providing an administrative remedy for persons who feel aggrieved with respect to their enrollment in the public schools of the State. The Act of March 30, 1955, entitled 'An Act to Provide for the Enrollment of Pupils in Public Schools' being Chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools and authorizes the boards to adopt rules and regulations with respect thereto. It further provides for application to and prompt hearing by the board in the case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the State. An administrative remedy is thus provided by State law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the Courts of the United States will not grant injunctive relief until administrative remedies have been exhausted."

Here the Court cites eight decisions of the United States Supreme Court supporting the foregoing statement of law.

To the same effect is the decision in *Mills v. Woods*, 190 Fed.2d 201 (Court of Appeals 5th Circuit, 1951) which was an appeal from a Federal District Court of Texas. On the question of administrative remedy, the Court said:

> "Upon argument here, appellees concede that no administrative appeal from the action of the Board of Trustees was attempted, although it was also conceded that provision therefor is made by the Laws of Texas. In these circumstances, upon application of the principles ruled in *Cook v. Davis*, 5 Cir. 178 Fed.2d 595, 602, the Federal Court should not have adjudicated the issues unless and until the State administrative procedures had been exhausted."

It is true that under existing Arkansas laws the school directors have very broad powers in assigning pupils to particular schools. But, under the May 17, 1954, decision of the Supreme Court, assignments based entirely on race violate the 14th Amendment to the United States Constitution. Thus, under presently existing Arkansas laws, if a Negro pupil is assigned to a segregated school solely on the ground of race, such Negro can apply immediately to the Federal District Court for injunctive relief and the Federal District Court would have jurisdiction to try the issues raised by the complaint and grant whatever relief the Court considered appropriate under the May 17, 1954, and the May 31, 1955, decisions of the Supreme Court.

On the other hand, under the assignment law such as the 1955 North Carolina Act or the proposed Virginia assignment law, a child who had been assigned under the provisions of those acts and not based solely on race would be compelled to exhaust the administrative remedy provided for in the act before the Federal Court

would have jurisdiction to try the issues presented.

The Committee recommends, therefore, the enactment of a School Assignment Law with appropriate administrative remedies patterned along the lines suggested by the Gray Commission and as exemplified by the 1955 North Carolina Act.

The Committee submits this report subject to such further requests and directions as the Governor may consider desirable and appropriate.

Respectfully submitted,

Marvin E. Byrd
Chairman

B. G. Dickey
Charles T. Adams
R. B. McCulloch, Sr.
J. L. Shaver

Members of the Committee

EDUCATION
Public Schools—Louisiana

House Bill No. 438 of the 1956 session of the Louisiana Legislature, signed by the Governor on June 21, 1956, amends the compulsory school attendance law so as to provide for its suspension where integration of the races has been required by court or other order. That Bill follows:

AN ACT

To amend and re-enact Section 221 of Title 17 of the Louisiana Revised Statutes of 1950 relative to compulsory school attendance of certain children, to add provision suspending said compulsory school attendance within public school districts, public school systems and/or private day schools where integration of the races therein has been ordered by any judicial decree or other authority.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 221 of Title 17 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§ 221. Age of compulsory attendance; duty of parents; penalty

Every parent, guardian, or other person residing within the State of Louisiana, having control or charge of any child between the ages of seven and fifteen years, both inclusive (i.e., from the seventh to the sixteenth birthday), shall send such child to a public or private day school; provided, however, that the foregoing provision be and the same shall be suspended and inoperative within any public school system and/or private day school wherein integration of the races has been ordered by any judicial decree or other authority.

Whoever violates the provisions of this Section or any other provision of this Subpart, shall be fined not more than ten dollars or imprisoned for not more than ten days, or both. Each day the violation continues shall constitute a separate offense

Visiting teachers, or other persons authorized to serve instead of visiting teachers as provided in R.S. 17:225 with the approval of the parish superintendent of education, shall file proceedings in court to enforce the provisions of this Sub-part.

Section 2. All laws or parts of laws in conflict herewith are hereby repealed.

EDUCATION
Public Schools—North Carolina

On June 19, 1956, the Governor of North Carolina issued a proclamation calling an extraordinary session of the North Carolina General Assembly to consider measures recommended

by the report of the North Carolina Advisory Committee on Education (1 Race Rel. L. Rep. 581) with respect to meeting the problems arising in relation to the decisions in the *School Segregation Cases*. The proclamation follows:

EXECUTIVE DEPARTMENT

Raleigh, North Carolina

PROCLAMATION

WHEREAS, the General Assembly of 1955, by Resolution No. 29, directed the appointment of a committee, known as the Advisory Committee on Education, "to provide counsel and advice to the Governor, the General Assembly, the State Board of Education, and the county and local school boards throughout the State," and

WHEREAS, the Advisory Committee on Education, on April 5, 1956, filed a report with the Governor, and said in its report:

"We recommend that a special session of the General Assembly of North Carolina be called this summer to consider submitting to the people the question of changes in our State Constitution.

"We recommend that this Legislature cause to be submitted to a vote of the people of North Carolina constitutional amendments, or a single amendment to achieve these desirable and, we think, necessary results:

"1. Authority for the General Assembly to provide from public funds financial grants to be paid toward the education of any child assigned against the wishes of his parents to a school in which the races are mixed—such grants to be available for education only in non-sectarian schools and only when such child cannot be conveniently assigned to a non-mixed public school.

"2. Authority for any local unit created pursuant to law and under conditions to be prescribed by the General Assembly, to suspend by majority vote the operation of the public schools in that unit, notwithstanding present constitutional provisions for public schools."

WHEREAS, the decisions of the Supreme Court of the United States, in the interpretation of the Fourteenth Amendment to the Constitution of the United States, have created special problems in the State of North Carolina and extraordinary occasions have occurred as a result of said decisions, and it is deemed necessary, in order to provide means for the continuing education of our youth to submit to the people of the State amendments to our State Constitution and to enact legislation in order that our youth may be educated.

NOW, THEREFORE, I, Luther H. Hodges, Governor of the State of North Carolina, do, by and with the advice of the Council of State, proclaim that the General Assembly of the State of North Carolina shall meet in Extraordinary Session at Raleigh, North Carolina, at Noon, on Monday, July 23, 1956, for the purpose of considering and acting upon the report of the North Carolina Advisory Committee, created pursuant to Resolution No. 29 of the 1955 General Assembly, and to enact such legislation, including the proposed constitutional amendments, as may be appropriate to give effect to said report and to provide a continuing means of educating the youth of the State of North Carolina. I do hereby call upon, notify and direct all members of the said General Assembly to meet at the Capitol, in the City of Raleigh, at Noon, on July 23, 1956, in such General Assembly as provided by the Constitution.

Done at our capital city of Raleigh, this 19th day of June, in the Year of our Lord one thousand nine hundred and fixty-six.

Luther H. Hodges
Governor

By the Governor:
E. L. Rankin, Jr.
Private Secretary

EDUCATION
Public Schools—South Carolina

Act No. 712 of the General and Permanent Laws of South Carolina, 1956, enacted March 16, 1956, provides for the transfer of pupils in public schools where their enrollment may threaten the public peace.

An Act Relating To The Transfer Of Pupils From One School To Another.

Be it enacted by the General Assembly of the State of South Carolina:

Officers—transfer pupils upon request of school officials:

SECTION 1. Whenever the principal, superintendent, or any other responsible school official in charge of a school in this state has reason to believe that the enrollment of certain pupils in a certain school may threaten to result in riot, civil commotion, or may in any way disturb the peace of the citizens of the community in which the school is located, such school official shall notify the sheriff or other law enforcement officer in the county. On being so notified, the sheriff or other law enforcement officer in the county may remove such pupils from such school and may transfer them, at the direction of the superintendent, to another school in which there appears to be less likelihood of disturbing the peace. Any law enforcement officer is authorized to enforce the provisions of this act.

Repeal:

SECTION 2. All acts or parts of acts inconsistent herewith are hereby repealed.

Time effective:

SECTION 3. This act shall take effect upon its approval by the Governor.

Approved the 16th day of March, 1956.

EDUCATION
Colleges and Universities—Louisiana

House Bill No. 437 of the 1956 session of the Louisiana Legislature, signed by the Governor on June 20, 1956, provides certain requirements for entering publicly financed institutions of higher learning in the state. An additional requirement is for a certificate of eligibility and good moral character, signed by the Superintendent of Education of the county, parish, etc. and by the principal of the high school from which graduated. That Bill follows:

AN ACT

Establishing certain requirements for admittance to publicly financed institutions of higher learning in the State of Louisiana, providing penalties for violations hereof, and to repeal all laws or parts of laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. No person shall be registered at or admitted to any publicly financed institution of higher learning of this state unless he or she shall have first filed with said institution a certificate addressed to the particular institution sought to be entered attesting to his or her eligibility and good moral character. This certificate must be signed by the Superintendent of Education of the Parish, County, or Municipality wherein said applicant graduated from High School, and by the principal of the High School from which he graduated.

Section 2. The form of the above referred to certificate shall be prepared by the Department of Education of the State of Louisiana, and a sufficient number thereof shall be furnished to each Superintendent of Education through the State to meet the annual requirements of those seeking admission to the above institutions. He shall furnish sufficient copies thereof to appli-

cants residing outside the State of Louisiana who apply therefor.

Section 3. Each student graduating from any public High School in the State of Louisiana shall be given proper notice of the above requirement at the time of his or her graduation; all publicly financed institutions of higher learning shall incorporate in their annual catalogues proper notice that the above referred to certificate is an essential requirement for admission.

Section 4. Any official or employee of any institution of higher learning financed by the State of Louisiana who admits any student to said institution in violation of the provisions of this Act shall be deemed guilty of committing a misdemeanor and upon conviction thereof shall be fined not more than $500.00 or imprisoned for not more than six months, or both.

Section 5. The State Board of Education and/or the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College are hereby especially authorized and empowered to adopt such other entrance requirements, including aptitude and medical examinations, as in their judgment may be fit and proper.

Section 6. All laws or parts of laws in conflict herewith are hereby repealed.

EDUCATION

Colleges and Universities—South Carolia

The General Appropriations Act (Act No. 813) of the General and Permanent Laws of South Carolina, 1956, contains a number of provisions restricting the expenditure of funds provided by that Act for state institutions to those institutions where racial integration is not practiced. In addition, Section 3 of that Act provides for the closing of state-supported colleges upon the admission of any pupil on court order and for the concurrent closing of the South Carolina State [Negro] College.

* * *

SECTION 3

State-supported colleges to close upon court order to admit pupils:

All appropriations for colleges and institutions of higher learning being made on the basis of racial segregation, the boards of trustees or other governing bodies of the University of South Carolina, The Citadel, Clemson College, Winthrop College, State Medical College, and South Carolina State College are each hereby directed to close its said institution upon any pupil being ordered admitted immediately to it by the order of any Court, and to keep it closed while the pupil presents himself or herself for admittance, or until the court order is revoked.

Provided, However, If any one of the State supported institutions of higher learning herein designated, other than the South Carolina State College, shall be forced to close as a result of a pupil being admitted by any Court order, the South Carolina State College shall likewise be closed until such time as the other institution is opened.

* * *

GOVERNMENTAL FACILITIES

Segregation—Louisiana

House Bill No. 435 of the 1956 session of the Louisiana Legislature, signed by the Governor on June 20, 1956, provides for the operation of all public (*i.e.*, operated by the state or

a political subdivision thereof) recreational facilities on a racially separate basis through the operation of the state police powers. That Act follows:

AN ACT

In the exercise of the police power of the State of Louisiana; to provide that all public parks, recreation centers, play grounds, community centers and other such facilities at which facilities for swimming, dancing, golfing, skating or other recreational activities are conducted shall be operated separately for members of the white and colored race in order to promote and protect public health, morals, and the peace and good order in this State; to define "public" parks and recreational facilities; to provide penalties for the violation of this act and to repeal all laws and parts of laws in conflict herewith.

Whereas, the exercise of the State's police power shall never be abridged as provided in Section 18 of Article XIX of the Constitution of the State of Louisiana, which provision is based upon the powers reserved to the State in the Tenth Amendment to the United States Constitution; and

Whereas, in the exercise of said State police power it is necessary to provide complete separation of the White and Colored races in all recreational activities.

Be It Enacted by the Legislature of Louisiana:

Section 1. All public parks, recreation centers, play grounds, community centers and other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted shall be operated separately for members of the white and colored races. This shall not preclude mixed audiences at such facilities, provided separated sections and rest room facilities are reserved for members of white and colored races. This provision is made in the exercise of the State's police power and for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race.

Section 2. "Public" parks and other recreational facilities as used herein shall mean any and all recreational facilities operated by the State of Louisiana or any of its parishes, municipalities or other subdivisions of the State.

Section 3. Any person, firm or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction therefor by a court of competent jurisdiction for each such violation shall be fined not less than five hundred dollars nor more than one thousand dollars, or sentenced to imprisonment in the parish jail not less than ninety days nor more than six months, or both, fined and imprisoned as above, at the discretion of the Court.

Section 4. In case any part of this Act shall be held to be unconstitutional, this shall not have the effect of invalidating any part of it that is constitutional, and the part or parts not affected by such ruling shall continue in full force and effect. This Act shall be liberally construed to protect and preserve the State Police Power as provided in this Act.

Section 5. That any laws or parts of laws in conflict herewith be and the same are hereby repealed.

GOVERNMENTAL FACILITIES

Disposal—Alabama

Act No. 67, April 5, 1956, of the Second Special Session of the Alabama Legislature, 1956, proposes an amendment to the state constitution which would authorize the legislature to make provision for disposal of certain recreational and other facilities.

AN ACT

Proposing an amendment to Section 94 of Article IV of the Constitution to provide for the alienation, with or without consideration, of certain public improvements if approved at a referendum held for that purpose.

Be It Enacted by the Legislature of Alabama:

Section 1. It is hereby proposed that Section 94 of Article IV of the Constitution be amended to read as follows:

"Section 94. The legislature shall not have

power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise. It is provided, however, that the legislature may enact general, special, or local laws authorizing political subdivisions and public bodies to alienate, with or without a valuable consideration, public parks and playgrounds, or other public recreational facilities and public housing projects, conditional upon the approval of a majority of the duly qualified electors of the county, city, town, or other subdivision affected thereby, voting at an election held for such purpose."

Section 2. An election shall be held upon the proposed amendment on Tuesday, August 28, 1956, unless that day arrives before the expiration of three months from final adjournment of this session of the Legislature, in which event the election shall be held on the same day as the next general election of state officers. The election shall be held in accordance with the provisions of Sections 284 and 285 of the Constitution of Alabama, as amended, and Chapter 1, Article 18, Title 17 of the Code of Alabama (1940).

Section 3. Notice of the election and of the proposed amendment shall be given by proclamation of the Governor, which proclamation shall be published once a week for four successive weeks next preceding the day appointed for the election in a newspaper in each county of the State. In every county in which no newspaper is published, a copy of the notice shall be posted at each courthouse and post office.

Constitutional Amendment.

Passed the House March 16, 1956.

Passed the Senate April 5, 1956

GOVERNMENTAL FACILITIES

Beaches and Swimming Pools—Florida

On May 23 and 25, 1956, the City of Delray Beach, Florida, adopted a series of emergency ordinances with respect to the use by Negroes of the municipal beach and swimming pool. Those ordinances follow:

EMERGENCY ORDINANCE
NO. 236

An emergency ordinance of the city of Delray Beach, Florida, exercising said city's police power to prevent inter-racial riots within said city; defining the terms as used herein; forbidding the use of the municipal beach and municipal pool to the Negro race; prescribing penalties for any violation and specifying duration of the emergency.

WHEREAS, a great deal of unfavorable publicity has resulted to the City of Delray Beach, Florida, because said City has no ordinance or regulation preventing the intermingling of the Negro and white races within this community, and,

WHEREAS, as a result of such adverse publicity, large numbers of Negroes from other communities have come upon the Municipal Beach, and,

WHEREAS, as a result of this invasion of the Municipal Beach by these non-resident Negroes, near riots have occurred between members of the Negro race and members of the white race, and,

WHEREAS, racial tension has increased in this community to the point that the life of one commissioner of the City of Delray Beach has been threatened, and,

WHEREAS, the Municipal Beach and the Municipal Pool is located adjacent to the white residential area and removed from the Negro residential area, and,

WHEREAS, an emergency exists in the City of Delray Beach, Florida, due to the fact that

no ordinance exists prohibiting the mingling of the Negro and white races on the Municipal Beach and in the Municipal Pool, and the Council of said City deems it necessary for the immediate preservation for public peace, property, health, morals and safety, that this ordinance be passed as an emergency ordinance, and,

WHEREAS, the State of Florida has heretofore granted unto the City of Delray Beach, Florida, police powers, which grant appears in the Municipal Charter at Section 7 (15), and,

WHEREAS, said State of Florida has the power and authority to delegate such police powers to its municipalities by reason of the Constitution of the State of Florida and the Constitution of the United States of America, and in order to prevent strife and inter-racial riots and to promote and preserve the health, safety and general welfare of all of the citizens of Delray Beach, Florida

NOW, THEREFORE, by virtue of the police powers granted to said City as aforesaid, be it and it is ordained by the City Commission of the City of Delray Beach, Florida, as follows:

Section 1. Definitions.

For the purpose of this ordinance:

(a) "Negro" is defined to be any person of the Negro race as defined by the Florida Statutes, 1941, in Section 1.01.

(b) "Municipal Beach" is defined to be that parcel of land located in Palm Beach County, Florida, more particularly described as follows, to-wit;

That parcel of land in Section 16, Township 46 South, Range 43 East, lying between the sidewalk as now laid out and in use, which sidewalk lies along the East side of Ocean Boulevard and the high water mark of the Atlantic Ocean.

(c) "Municipal Pool" defined is that certain swimming pool located upon the following described property, as well as all improvements located thereon, said property being described as follows, to-wit:

Commencing at the Northeast corner of Lot 17 of the subdivision of the East half (E½) of Section 16, Township 46 South, Range 43 East in Palm Beach County, Florida, said subdivision plat being made by Geo. W. Potter and executed by Sarah G. Gleason and W. H. Gleason and others and duly recorded in the records of the Clerk of the Circuit Court of Palm Beach County, Florida. From said point of beginning go West on the South boundary line of Atlantic Avenue, 150 feet; thence go South 50 feet; thence go East to the East boundary line of said Lot 17, from thence go northerly along the East boundary line of Lot 17 to the point of comemncing, and Lot 17 and the East One Half (E½) of Lot 18 in Block 1 in Ocean Park, according to a plat of Ocean Park now on file in the office of the Clerk of the Circuit Court in and for Palm Beach County, Florida.

Section 2.

No member of the Negro race shall go upon the Delray Beach Municipal Beach or the Delray Beach Municipal Pool as said terms are defined and described herein, during the interim of this emergency unless said person is an employee of the City of Delray Beach, Florida, and is directed by proper authority to go upon said beach or said pool in pursuit of their employment.

Section 3.

The emergency as herein defined shall be deemed to exist until this ordinance is repealed by the City Commission of the City of Delray Beach, Florida.

Section 4. Enforcement.

(a) It shall be unlawful for any person to fail or refuse to comply with and abide by any of the provisions of this ordinance.

(b) Any person who shall violate this ordinance, upon conviction thereof, shall be fined not more than Five Hundred and 00/100 ($500.00) dollars or imprisoned in the City jail or at hard labor upon the streets or other public works of the City, not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 5. Effective Date.

This is an emergency ordinance and shall become effective immediately upon its passage.

PASSED AND ADOPTED in Special Session this the 23rd day of May, A.D. 1956.

/S/ MIKE YARGATES
Mayor

ATTEST:
/S/ R. D. WORTHING
City Clerk

EMERGENCY ORDINANCE
G-237

An emergency ordinance of the City of Delray Beach, Florida, exercising said city's police power to prevent riots within said city; forbidding the carrying of weapons on the person or in any motor vehicle; authorizing the searching of all individuals and vehicles in the public places of said city for dangerous weapons; authorizing the confiscation thereof and prescribing penalties for the interference with any police officer in enforcing this ordinance.

WHEREAS, a great amount of tension exists in the City of Delray Beach, Florida, over the use of the Municipal Beach and Municipal Swimming Pool, and

WHEREAS, the City Commission has been informed that an unusually large number of residents of this City and nearby areas have recently purchased large quantities of guns and ammunition, and

WHEREAS, persistent rumors have come to the attention of the City Commission that trouble will soon break out on the Municipal Beach which may lead to injury and death to the residents of this City, and

WHEREAS, an emergency exists in the City of Delray Beach, Florida, due to the fact that no ordinance exists authorizing the stopping of all persons and vehicles within the City of Delray Beach; the searching of same for the purpose of locating concealed weapons and the confiscation of such weapons, and the City Commission deems it necessary for the immediate preservation of public peace, property, health, morals and safety, that this ordinance be passed as an emergency ordinance, and

WHEREAS, the State of Florida has heretofore granted unto the City of Delray Beach, Florida, police powers, which grant appears in the Municipal Charter at Section 7 (15), and

WHEREAS, the State of Florida has the power and authority to delegate such police powers to its municipalities by reason of the Constitution of the State of Florida and the Constitution of the United States of America, in order to prevent strife and riots and to promote and preserve the health, safety and general welfare of all of the Citizens of Delray Beach, Florida.

NOW, THEREFORE, By virtue of the Police Power granted to said City as aforesaid, BE IT AND IT IS HEREBY ORDAINED by the City Commission of the City of Delray Beach, Florida, as follows:

Section 1. That no person other than a duly qualified officer of the law shall, on the streets, alleys, sidewalks, parks, beaches or other public places within the City of Delray Beach, Florida, during the interim of this emergency, carry either on his person or in any vehicle any dangerous weapon.

Section 2. The Chief of Police and the police officers of the City of Delray Beach, Florida, are hereby authorized to search any and all persons and vehicles who are upon the public places of the City of Delray Beach, Florida, as above set forth, and to confiscate and take from them such dangerous weapons as may be found thereon or therein.

Section 3. For the purpose of enforcing this ordinance, the Chief of Police and the police officers of the City of Delray Beach, Florida, are authorized to set up such road blocks as may be necessary in the opinion of the Chief of Police of this City for enforcing this ordinance.

Section 4. The emergency as herein defined shall be deemed to exist until this ordinance is repealed by the City Commission of the City of Delray Beach, Florida.

Section 5. Any person who shall violate this ordinance, upon conviction thereof, shall be fined not more than $500.00 or imprisoned in the City Jail or at hard labor upon the streets or other public works of the City not exceeding sixty (60) days, or both such fine and imprisonment.

Section 6. This is an emergency ordinance and shall become effective immediately upon its passage.

PASSED AND ADOPTED in Special Session on this the 25th day of May, A. D. 1956.

/S/ MIKE YARGATES
Mayor

ATTEST:
/S/ R. D. WORTHING
City Clerk

ORDINANCE NO. G-238.

An emergency ordinance of the City of Delray Beach, Florida, exercising said City's police power to prevent inter-racial riots within said City; defining the terms as used herein; forbidding the use of the Municipal Beach and Municipal Pool to the Negro race; prescribing penalties for any violations; specifying duration of the emergency and repealing all ordinaces in conflict herewith.

WHEREAS, a great deal of unfavorable publicity has resulted to the City of Delray Beach, Florida, because said City has no ordinance or regulation preventing the intermingling of the Negro and white races within this community, and

WHEREAS, as a result of such adverse publicity, large numbers of Negroes from other communities have come upon the Municipal Beach, and

WHEREAS, as a result of this invasion of the Municipal Beach by those non-resident Negroes, near riots have occurred between members of the Negro race and members of the white race, and

WHEREAS, racial tension has increased in this community to the point that the life of one Commissioner of the City of Delray Beach, Florida, has been threatened, and

WHEREAS, the Municipal Beach and the Municipal Pool are located adjacent to the white residential area and removed from the Negro residential area, and

WHEREAS, an emergency exists in the City of Delray Beach, Florida, due to the fact that no adequate ordinance exists prohibiting the mingling of the Negro and white races on the Municipal Beach and in the Municipal Pool, and the Commission of said City deems it necessary for the immediate preservation for public peace, property, health, morals and safety, that this ordinance be passed as an emergency ordinance, and

WHEREAS, the State of Florida has heretofore granted unto the City of Delray Beach, Florida, police powers, which grant appears in the Municipal Charter at Section 7 (15), and

WHEREAS, said State of Florida has the power and authority to delegate such police powers to its municipalities by reason of the Constitution of the State of Florida and the Constitution of the United States of America, and in order to prevent strife and inter-racial riots and to promote and preserve the health, morals, safety and general welfare of all of the Citizens of Delray Beach, Florida, and

WHEREAS, the State of Florida has granted unto Municipal Corporations, for the preservation of public peace and morals, for the suppression of riots and disorderly assemblies and for the order and Government of the City and Town, the right to impose such pains, penalties and forfeitures as may be needed to carry the same into effect as provided in the Florida Statutes of 1941 at Section 165.19.

NOW, THEREFORE, by virtue of the police powers granted to said City as aforesaid, BE IT and IT IS ORDAINED by the City Commission of the City of Delray Beach, Florida, as follows:

Section 1. Definitions.

For the purpose of this ordinance:

(a) "Negro" is defined to be any person of the Negro race as defined by the Florida Statutes of 1941, in Section 1.01.

(b) "Municipal Beach" is defined to be that parcel of land located in Palm Beach County, Florida, more particularly described as follows, to-wit:

That parcel of land in Section 16, Twp. 46 South, Rge. 43 East, lying between the sidewalk as now laid out and in use, which sidewalk lies along the East side of Ocean

Boulevard and the high water mark of the Atlantic Ocean.

(c) "Municipal Pool" defined is that certain swimming pool located upon the following described property, as well as all improvements located thereon, said property being described as follows, to-wit:

Commencing at the Northeast corner of Lot 17 of the subdivision of the East half (E½) of Section 16, Twp. 46 South, Rge. 43 East, in Palm Beach County, Florida, said subdivision plat being made by Geo. W. Potter and executed by Sarah G. Gleason, W. H. Gleason and others and duly recorded in the records of the Clerk of the Circuit Court in and for Palm Beach County, Florida. From said point of begining go West on the South boundary line of Atlantic Avenue 150 feet; thence go South 50 feet; thence go East to the East boundary line of said Lot 17, from thence go Northerly along the East boundary line of Lot 17 to the point of beginning, and Lot 17 and the East one-half (E½) of Lot 18 in Block 1 of Ocean Park, according to a plat of Ocean Park now on file in the office of the Clerk of the Circuit Court in and for Palm Beach County, Florida.

Section 2.

No member of the Negro race shall go upon the Delray Beach Municipal Beach or the Delray Beach Municipal Pool as said terms are defined and described herein, during the interim of this emergency unless said person is an employee of the Ctiy of Delray Beach, Florida, and is directed by proper authority to go upon said Beach or said Pool in pursuit of their employment.

Section 3.

The emergency as herein defined shall be deemed to exist until this ordinance is repealed by the City Commission of the City of Delray Beach, Florida.

Section 4. Enforcement.

(a) It shall be unlawful for any person to fail or refuse to comply with and abide by any of the provisions of this ordinance.

(b) Any person who shall violate this ordinance, upon conviction thereof, shall be fined not more than Five Hundred (500) dollars, or imprisoned in the City jail or at hard labor upon the streets or other public works of the City, not exceeding sixty (60) days, or by both such fine and imprisonment.

Section 5.

Any ordinance of the City of Delray Beach, Florida, in conflict herewith is hereby repealed.

Section 6.

This is an emergency ordinance and shall become effective immediately upon its passage.

PASSED AND ADOPTED in Special Session this the 25th day of May, A.D. 1956.

/S/ MIKE YARGATES
Mayor

ATTEST:
/S/ R. D. WORTHING
City Clerk

GOVERNMENTAL FACILITIES
Municipal Boundaries—Florida

On June 5, 1956, the City of Delray Beach, Florida, adopted a resolution directing that legislation be drafted and submitted to the legislature of the state to provide for the exclusion of the so-called "Negro area" from the city limits. That resolution follows:

A resolution of the City Commission of the City of Delray Beach, Florida, approving a special act to be submitted to the legislature of the state of Florida for enactment.

WHEREAS, the City Commission of the City of Delray Beach, Florida, determines that it is to the best interest of the general public of the City of Delray Beach, Florida, in order to pre-

serve the health, safety and general welfare of the community to cause to be passed special legislation re-defining the municipal boundaries of the City of Delray Beach, Florida.

AND WHEREAS, it is of the utmost importance that such a legislative act be passed with all possible speed,

THEREFORE, BE IT RESOLVED, by the City Commission of the City of Delray Beach, Florida, as follows:

SECTION 1: That the City Attorney, John H. Adams and special counsel, John Moore, are authorized and directed to draft a special act of the legislature re-defining the boundaries of the City of Delray Beach, Florida, by excluding the entire Negro area therefrom, and to take all necessary and required steps incident to having the same enacted into law as soon as possible.

SECTION 2: That it be submitted to the State Legislature for enactment.

ADOPTED BY the City Commission of the City of Delray Beach, Florida, this the 5th day of June, A. D. 1956.

/S/ MIKE YARGATES
Mayor

ATTEST:
/S/ R. D. WORTHING
City Clerk

GOVERNMENTAL FACILITIES

State Parks—South Carolina

Section 14 of the General Appropriations Act (Act. No. 813) of the General and Permanent Laws of South Carolina, 1956, provides for the withdrawal of authority to admit persons to state parks from state park officials and for racially segregated use of such parks.

* * *

SECTION 14

Supervision and use of State Parks:

The State Commission of Forestry, the State Forester, the State Park Director, and the Superintendents of State Parks are each hereby divested of any and all authority heretofore conferred upon each of them, if any, to admit persons to the facilities of the State Parks and to operate or to supervise the operation of State Parks. Henceforth, the State Commission of Forestry is vested with the authority to operate and supervise only racially separate parks and to admit to the facilities of the State Parks only persons having the express permission of the State to use such facilities. The authority to admit to the facilities of the State Parks persons who do not have the express permission of the State to use the same and to operate and supervise racially integrated parks is denied to the State Commission of Forestry, the State Forester, the State Director, and the Superintendent of State Parks.

Permission is hereby granted to the citizens of the State to use the facilities at the Parks for their own race under such rules and regulations not inconsistent with the provisions of this section as the State Commission of Forestry may establish.

No person shall have access to the facilities of the State Parks without the express permission of the State and any person who attempts to use or who uses the facilities of the State Parks without the express permission of the State shall be guilty of trespass upon State Park property and upon conviction shall be sentenced to pay a fine not to exceed Five Thousand Dollars ($5,000.00) or to be imprisoned for not more than two (2) years or both.

All acts or parts of acts inconsistent with any of the provisions of this Section are hereby repealed. Should any provision of this Section be declared to be unconstitutional, all other provisions of this Section shall remain in full force and effect.

* * *

PUBLIC ACCOMMODATIONS
Housing—New York

Chapter 563, Laws of New York, 1956, enacted April 13, 1956, amends the New York "Law Against Discrimination." The material in italics is new and that in brackets is old law to be omitted.

CHAPTER 563

AN ACT to amend the executive law and the civil rights law, in relation to the elimination and prevention of certain practices of discrimination in publicly assisted housing accommodations and in relation to the jurisdiction of the state commission against discrimination

Became a law April 13, 1956, with the approval of the Governor. Passed, by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly do enact as follows:

Section 1. Subdivision eleven of section two hundred ninety-two of the executive law, as added by chapter three hundred forty of the laws of nineteen hundred fifty-five, is hereby amended to read as follows:

11. The term "publicly-assisted housing accommodations" shall include all housing accommodations *within the state of New York* in

(a) public housing,

(b) housing operated by housing companies under the supervision of the commissioner of housing, [and]

(c) housing constructed after July first, nineteen hundred fifty, within the state of New York

(1) which is exempt in whole or in part from taxes levied by the state or any of its political subdivisions,

(2) which is constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine,

(3) which is constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction, or

(4) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance,

(d) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(e) housing which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (2) a commitment, issued by a government agency after July first, nineteen hundred fifty-five, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal govern-

ment or any agency thereof, or the state or any of its political subdivisions or any agency thereof.

§ 2. Section two hundred ninety-two of such law is hereby further amended by adding thereto a new subdivision, to be subdivision twelve, to read as follows:

12. The term "multiple dwelling", as herein used, means a dwelling which is occupied, as a rule, for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family," as used herein, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers, or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

§ 3. Paragraph (e) of subdivision three of section eighteen-b of the civil rights law, as added by chapter three hundred forty-one of the laws of nineteen hundred fifty-five, is hereby amended to read as follows:

(e) (1) which is located in a [class A] multiple dwelling [as defined in section four of the multiple dwelling law]; and (2) the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its poltical subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; or

§ 4. Section eighteen-b of such law is hereby further amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. The term "multiple dwelling", as herein used, means a dewlling which is occupied, as a rule, for permanent residence purpose and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family" as used herein, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

§ 5. This act shall take effect July first, nineteen hundred fifty-six.

STATE OF NEW YORK, *ss:*
Department of State.

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

CARMINE G. DESAPIO,
Secretary of State

TRANSPORTATION

Stations and Waiting Rooms—Louisiana

House Bill No. 436 of the 1956 session of the Louisiana Legislature, signed by the Governor on June 22, 1956, provides that common carriers of passengers in the state shall provide separate waiting rooms and other facilities at stations for white intrastate passengers, and for Negro intrastate passengers and interstate passengers. That Bill follows:

AN ACT

To require all common carriers of passengers for hire in intrastate travel providing waiting room and reception room facilities, to provide separate accommodations for white passengers traveling in intrastate travel, and to provide separate accommodations for interstate passengers and colored intrastate passengers; to provide for injunctive proceedings to enforce the provisions of this Act, to provide penalties for the violation hereof; and to repeal all laws or parts of law in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. That all common carriers of passengers for hire, providing waiting room and reception room facilities shall provide separate accommodations for white passengers traveling in intrastate travel, which accommodations shall bear a sign on which shall be painted or shown in bold letters the words, "White Waiting, Intrastate Passengers."

Section 2. That all such common carriers providing waiting room and reception room facilities shall provide separate accommodations for all other passengers whether traveling in intrastate or interstate travel which shall bear a sign on which shall be painted or shown in bold letters the words, "Waiting, Interstate Passengers and Colored Intrastate Passengers."

Section 3. There shall also be provided where such accommodations are furnished, separate toilets and separate facilities for drinking water for white intrastate passengers; and separate toilets and separate facilities for drinking for colored passengers, whether in intrastate or interstate travel, which shall be designated by signs the same as those provided for waiting or reception facilities.

Section 4. The accommodations furnished shall be equal for both white and colored passengers.

Section 5. The District Attorney of the Judicial District or Parish wherein a violation of this Act occurs shall institute action in the State District Court to enjoin such violation, for and in the name of the State of Louisiana.

Section 6. Any person or common carrier violating the provisions of this Act shall be deemed guilty of a misdemeanor and, upon conviction therefor, shall be punished by fine of not less than $100.00 or more than $500.00 and imprisonment in the parish jail for not less than 30 days or more than 6 months.

Section 7. Each day that such person or carrier refuses or fails to comply with the provisions of this Act shall be considered a separate and distinct offense.

Section 8. If any section or provision of this Act shall be held unconstitutional or invalid, for any reason, the remaining portions shall be unaffected, and the same shall continue in full force and effect. If this Act or any section or provision of this Act shall be held to be invalid or unconstitutional or applied to any person or group of persons or to any particular common carrier, the same shall continue in full force and effect with respect to all other persons and groups of persons and common carriers in the State of Louisiana. If this Act or any section or provision of this Act shall be held to be invalid or unconstitutional in relation to any circumstances or set of circumstances, the same shall continue in full force and effect as to all other circumstances, situations, and facts and circumstances.

Section 9. All laws or parts of laws in conflict herewith are hereby repealed.

EMPLOYMENT

Fair Employment Laws—Pennsylvania

Ordinance No. 615, May 3, 1955, of the City of Braddock, Pennsylvania, establishes a Fair Employment Practices Commission for the city. That ordinance follows:

FAIR EMPLOYMENT PRACTICES ORDINANCE prohibiting discrimination in employment because of race, color, religion, ancestry, national origin of place of birth by employers, employment agencies, labor organizations and others; establishing a Fair Employment Practices Commission; prescribing the duties and powers of the Commission; and providing penalties.

The Council of the Borough of Braddock hereby enacts as follows:

SECTION 1. Findings of Fact:

(a) That discrimination in public and private employment because of race, color, religion, ancestry, national origin or place of birth, is contrary to democratic principles and creates unrest and tensions between groups thus fomenting strife, disturbances and disorders which substantially and adversely affect the good order and general welfare of this Borough.

(b) Such job discrimination with consequent arbitrary denial of job opportunities, unjustly condemns large groups of inhabitants of this Borough to depressed living conditions which breed crime and vice, juvenile delinquency and disease, thereby causing great injury to the public safety, public health and general welfare of this Borough, reducing its productive capacity and hampering its progress.

(c) The harmful effects produced by such job discrimination also tend to reduce the public revenues and to impose substantial financial burdens upon the public for the relief and amelioration of the conditions so created.

(d) Experience in other large municipalities has proved that legislation prohibiting such job discrimination removes some of the sources of strife, poverty, crime and disease and directly promotes public welfare and good government.

SECTION 2. Declaration of Policy:

It is hereby declared to be the policy of this Borough to the intent and for the purpose of protecting the public safety, public health and general welfare, for the maintenance of peace and good government, and for the promotion of the Borough's trade, commerce and manufacturers to preserve and protect the right to employment within the Borough free from discrimination because of race, color, religion, ancestry, national origin or place of birth, and to that end to prohibit unlawful employment practices.

SECTION 3. Scope of the Ordinance:

This ordinance applies to employment practices within the territorial limits of this Borough and to employment performed or to be performed within the territorial limits of this Borough.

SECTION 4. Definitions:

As used in this ordinance, unless a different meaning clearly appears from the context:

(a) The terms "person" includes any individual, partnership, corporation, labor organization or other association, including those acting in a fiduciary or representative capacity whether appointed by a court or otherwise. The term "person" as applied to partnerships, labor organizations or other associations includes their members and as applied to corporations includes their officers.

(b) The term "employer" includes the Borough of Braddock and any governmental agency as to which it may legislate, and every person who employs more than five (5) employees exclusive of parents, spouse or children of such person, but it does not include fraternal, sectarian, charitable or religious organizations which are not supported in whole or in part

by any governmental appropriations.

(c) The term "labor organization" includes any organization which exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in relation to employment.

(d) The term "employment agency" includes every person who regularly undertakes in this Borough, with or without compensation, to procure opportunities for employment or to procure, recruit, refer or place employees.

(e) The term "employment" does not apply to the employment of individuals to serve as domestic servants or in particular occupations or positions which the Commission certifies to be exempt from the provisions of this ordinance in accordance with subsection (c) of Section 8 of this ordinance.

(f) The terms "discriminate" or "discrimination" include segregation, classification or any other limitation upon an individual's job opportunities, conditions of employment or membership in a labor organization.

(g) The term "Commission" means the Fair Employment Practices Commission established by this Ordinance.

SECTION 5. Unlawful Employment Practices:

It shall be unlawful employment practice, except where based upon applicable national security regulations established by the United States, by the Commonwealth of Pennsylvania, or by any political subdivision of the Commonwealth having jurisdiction in the Borough of Braddock, or except where based upon a bona fide occupational qualification certified by the Commission to be an occupation or position which reasonably requires the employment of a person or persons of a particular race, color or religion, in accordance with subsection (c) of Section 8 of this ordinance:

(a) For any employer to refuse to hire any individual or to otherwise discriminate against any individual with respect to hiring, tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(b) For any employer, employment agency or labor organization to establish, announce or follow a policy of denying or limiting, through a quota system or otherwise the employment or membership opportunities of any group or individual because of race, color, religion, ancestry, national origin or place of birth.

(c) For any employer, employment agency or labor organization to require of any applicant for employment or membership any information concerning race, color, religion, ancestry, national origin or place of birth.

(d) For any employer, employment agency or labor organization to cause to be published or circulated any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth.

(e) For any employment agency to fail or refuse to classify properly or refer for employment or to otherwise discriminate against any individual because of race, color, religion, ancestry, national origin or place of birth.

(f) For any employer substantially to confine or limit recruitment or hiring of individuals, with intent to circumvent the spirit and purpose of this ordinance, to any employment agency, employment service, labor organization, training school, training center or any other employee-referring source which serves individuals who are predominantly of the same race, color, religion, ancestry, national origin or place of birth.

(g) For any labor organization to discriminate against any individual in any way which would deprive or limit his employment opportunities or otherwise adversely affect his status as an applicant for employment or as an employee with regard to tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(h) For any employer, employment agency or labor organization to discriminate against any individual because he has opposed any practice forbidden by this ordinance or because he has made a complaint or testified or assisted in any manner in any investigation or proceeding under this ordinance.

(i) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

(j) If the provisions of this ordinance are not otherwise violated, it shall not be an unlawful employment practice for any employer to select for employment any person, who possesses qualifications, training or experience which best adapt him for the employer's business or profession.

SECTION 6. Persons Entering into Contracts with this Borough:

The Borough of Braddock and all of its contracting agencies shall include in all contracts hereafter negotiated a provision obligating the contractor to comply with this ordinance in connection with any work to be performed in this Borough and requiring the contractor to include a similar provision in all sub-contracts for work to be performed in this Borough.

SECTION 7. Fair Employment Practices Commission:

(a) There is hereby established a Fair Employment Practices Commission to carry out the provisions of this Ordinance.

(b) The Commission shall consist of Five (5) members to be appointed by the Borough Council. In order to provide for continuity of service, the terms of the members first appointed shall be as follows:

Two (2) members to serve for two (2) years,
Two (2) members to serve for three (3) years,

One (1) member to serve for four (4) years. Thereafter the term of service shall be for four (4) years. Each member of the Commission shall continue to serve after his term until his successor has been appointed and has qualified. The Commission shall elect one of its members as Chairman. Three (3) members of the Commission shall constitute a quorum for the transaction of business and a majority vote of those present at any meeting shall be sufficient for any official action taken by the Commission.

(c) All members appointed to the Commission shall be qualified electors of the Borough.

(d) The members of the Commission shall serve without compensation but they may be reimbursed for all expenses necessarily incurred in accordance with appropriations made by Borough Council.

SECTION 8. Duties of the Commission:

It shall be the duty of the Commission to:

(a) Initiate or receive and investigate complaints charging unlawful employment practices;

(b) Seek conciliation of complaints, hold hearings, make findings of fact, issue orders and publish its findings of fact and orders in accordance with the provisions of this Ordinance;

(c) Certify upon the request of any person that a particular occupation or position is exempt from the provisions of this ordinance if the Commission finds that the occupation or position reasonably requires the employment of a person or persons of a particular race, color or religion, and that such certification is not sought as a means of circumventing the spirit and purpose of this ordinance, the burden of proving the facts required for such a finding to be in each instance upon the perseon requesting the certification of exemption from the provisions of this ordinance;

(d) Render from time to time but not less than once a year a written report of its activities

and recommendations to the Borough Council;

(e) Formulate and carry out a comprehensive educational program designed to prevent and eliminate discrimination because of race, color, religion, ancestry, national origin or place of birth;

(f) Adopt such rules and regulations as may be necessary to carry out the provisions of this ordinance.

SECTION 9. Procedure:

(a) A complaint charging that any person has engaged in or is engaging in any unlawful employment practice may be made by the Commission itself, by an aggrieved individual, or by an organization which has as one of its purposes the combating of discrimination or the promotion of equal employment opportunities. A complaint must be filed with the Commission within sixty (60) days after the alleged unlawful employment practice.

(b) The Commission shall make a prompt and full investigation of each complaint of an unlawful employment practice.

(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the unlawful employment practice charged in the complaint by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

(d) In case of failure to eliminate the unlawful employment practice charged in the complaint by means of conciliation or persuasion, the Commission shall hold a public hearing to determine whether or not an unlawful employment practice has been committed. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful employment practice, hereinafter referred to as the respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the statement of charges. The respondent shall have the right to file an answer to the statement of charges, to appear at the hearing in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses.

(e) If upon all the evidence presented the Commission finds that the person charged in the complaint has not engaged in or is not engaging in any unlawful employment practice, it shall state its findings of fact and dismiss the complaint. If upon all the evidence presented the Commission finds that the respondent has engaged in or is engaging in an unlawful employment practice, it shall state its findings of fact and shall issue such order as the facts warrant.

(f) In the event the respondent fails to comply with any order issued by the Commission, the Commission shall certify the case and the entire record of its proceedings to the Borough Solicitor for appropriate action to secure enforcement of the Commission's order.

SECTION 10. Penalties:

Any person who violates any of the provisions of this ordinance or any rule or regulation adopted by the Commission, or who fails to comply with any order of the Commission shall, upon conviction thereof in a summary proceeding, before the Burgess of this Borough or a Justice of the Peace, be sentenced to pay a fine not exceeding One Hundred ($100.00) Dollars and costs or in default of payment of fine and costs shall be subject to imprisonment for a period not exceeding thirty (30) days in the discretion of the convicting Burgess or Justice of the Peace. Prosecutions under this ordinance shall be instituted by the Borough Solicitor and prosecutions may be brought only after a case has been certified to the Borough Solicitor by the Commission.

SECTION 11. Severability:

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons and circumstances. It is hereby declared to be the legis-

lative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

SECTION 12. Effective Date:

The effective date of this ordinance is May 15, 1955.

SECTION 13. Repeal:

That any ordinance or part of ordinance, conflicting with the provisions of this ordinance, be and the same is hereby repealed so far as the same affects this ordinance.

ORDAINED AND ENACTED this 3rd day of May 1955.

CASEY J. KUSZAJ
President of Council

EMPLOYMENT

Fair Employment Laws—Pennsylvania

Ordinance No. 237, effective July 1, 1955, of Pittsburgh, Pennsylvania, established procedures for the elimination of discrimination and for fair employment practices within the city. This ordinance supplants the Fair Employment Practices Ordinance of January 1, 1953.

AN ORDINANCE—Establishing procedures for the elimination of discrimination in the social, cultural and economic life of the City; requiring fair employment practices by prohibiting discrimination in employment because of race, color, religion, ancestry, national origin or place of birth by employers, employment agencies, labor organizations and others; establishing a Commission on Human Relations in the Office of the Mayor and prescribing the powers and duties thereof, including the powers and duties heretofore performed by the Division of Civic Unity, the Civic Unity Council and the Fair Employment Practices Commission; and providing penalties.

WHEREAS, Discrimination because of race, color, religion, ancestry, national origin or place of birth is contrary to American principles; and

WHEREAS, Such discrimination creates tensions between groups, thus fomenting strife, disturbances and disorders which substantially and adversely affect the good order and general welfare of the City of Pittsburgh; and

WHEREAS, Such discrimination with consequent restriction of opportunity to participate in the cultural, social and economic life of the City unjustly condemns large groups of residents of the City to depressed living conditions which breed crime, vice, juvenile delinquency and disease, thereby endangering the public safety and public health of the City; and

WHEREAS, The harmful effects of such discrimination also impair the City's productive capacity, reduce the public revenues and impose substantial financial burdens upon the public for the relief and amelioration of the conditions so created; and

WHEREAS, Experience in other large cities has proved that legislation prohibiting job discrimination removes some of the sources of strife, poverty, crime and disease, and directly promotes public welfare and good government; and

WHEREAS, It is deemed to be to the best interests of the City to centralize the administration and enforcement of anti-discrimination legislation in a single agency; NOW, THEREFORE,

THE COUNCIL OF THE CITY OF PITTSBURGH HEREBY ENACTS AS FOLLOWS:

Section 1. DECLARATION OF POLICY

It is hereby declared to be the policy of the City in the exercise of its police power for

the protection of the public safety, the public health and the general welfare, for the maintenance of peace and good government and for the promotion of the City's trade, commerce and manufacturers, to promote and protect the right and opportunity of all persons to participate in the social, cultural and economic life of the City, free from restrictions because of race, color, religion, ancestry, national origin or place of birth.

Section 2. SCOPE OF THE ORDINANCE

This ordinance applies to discriminatory practices, including employment practices, within the territorial limits of the City, and to employment performed or to be performed within the territorial limits of the City.

Section 3. DEFINITIONS

As used in this ordinance, unless a different meaning clearly appears from the context:

(a) The terms "discriminate" or "discrimination" mean any difference in treatment based on race, color, religion, ancestry, national origin or place of birth. With respect to employment, these terms include segregation, classification or any other limitation upon an individual's job opportunities, conditions of employment or membership in a labor organization.

(b) The term "Commission" means the Commission on Human Relations established in the Office of the Mayor by this ordinance.

(c) The term "person" includes any individual, partnership, corporation, labor organization or other association, including those acting in a fiduciary or representative capacity whether appointed by a court or otherwise. The term "person" as applied to partnerships, labor organizations or other associations includes their members and as applied to corporations includes their officers.

(d) The term "employer" includes the City of Pittsburgh and any governmental agency as to which it may legislate, and every person who employs more than five (5) employees exclusive of parents, spouse or children of such person, but it does not include fraternal, sectarian, charitable or religious organizations which are not suppported in whole or in part by any governmental appropriations.

(e) The term "labor organization" includes any organization which exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in relation to employment.

(f) The term "employment agency" includes every person who regularly undertakes in the City, with or without compensation, to procure opportunities for employment or to procure, recruit, refer or place employees.

(g) The term "employment" does not apply to the employment of individuals to serve as domestic servants or in particular occupations or positions which the Commission certifies to be exempt from the provisions of this ordinance in accordance with subsection (a) of Section 5 of this ordinance.

Section 4. COMMISSION ON HUMAN RELATIONS

(a) There is hereby established in the Office of the Mayor a Commission on Human Relations to carry out the provisions of this ordinance. The Commission shall consist of fifteen (15) members to be appointed by the Mayor. In order to provide for continuity of service the terms of the members of the Commission first appointed shall be as follows:

Five (5) members to serve for two (2) years.

Five (5) members to serve for three (3) years.

Five (5) members to serve for four (4) years.

Thereafter the term of service shall be for four (4) years. Each member of the Commission shall continue to serve after his term until his successor has been appointed and has qualified.

(b) The Commission shall elect one of its

members as chairman and may elect such other officers as it may deem necessary. The Commission shall hold meetings at regular intervals but not less frequently than once every month. Five (5) members of the Commission shall constitute a quorum for the transaction of business, and a majority vote of those present at any meeting shall be sufficient for any official action taken by the Commission.

(c) The members of the Commission shall serve without compensation, but they may be reimbursed for all expenses necessarily incurred in the performance of their duties in accordance with appropriations made by City Council.

(d) The Mayor shall appoint an Executive Director and such other personnel as may be authorized by City Council to assist the Commission in carrying out the provisions of this ordinance. In proposing a budget for the operation of the Commission, and in selecting the Executive Director and other personnel authorized by City Council, the Mayor shall take into consideration the recommendations of the Commission.

Section 5. DUTIES OF THE COMMISSION ON HUMAN RELATIONS

The Commission shall have the power and it shall be its duty to:

(a) Exercise and perform the following powers and duties heretofore exercised and performed by the Fair Employment Practices Commission:

(1) Initiate or receive and investigate complaints charging unlawful employment practices.

(2) Seek conciliation of such complaints, hold hearings, make findings of fact, issue orders and publish its findings of fact and orders in accordance with the provisions of this Ordinance.

(3) Certify upon the request of any person that a particular occupation or position is exempt from the provisions of this ordinance relating to unlawful employment practices if the Commission finds that the occupation or position reasonably requires the employment of a person or persons of a particular race, color or religion, and that such certification is not sought as a means of circumventing the spirit and purpose of this ordinance, the burden of proving the facts required for such a finding to be in each instance upon the person requesting the certification of exemption from the provisions of this Ordinance.

(b) Initiate or receive and investigate other complaints of discrimination against any person because of race, color, religion, ancestry, national origin or place of birth, and to seek conciliation of such complaints. Any complaint filed under this subsection which the Commission believes may constitute a violation of a law of the Commonwealth of Pennsylvania or an ordinance of the City may be certified to the City Solicitor for such action as he may deem proper.

(c) Study and investigate by means of public hearings or otherwise any conditions having an adverse effect on intergroup relations, including alleged violations of the penal laws of the Commonwealth of Pennsylvania prohibiting discrimination in public accommodations, as well as any other laws of the Commonwealth or ordinances of the City heretofore or hereafter enacted prohibiting discrimination against persons because of race, color, religion, ancestry, national origin or place of birth.

(d) Institute and conduct educational and other programs to promote the equal rights and opportunities of all persons, regardless of their race, color, religion, ancestry, national origin or place of birth, and to promote understanding among persons and groups of different races, colors, religions, ancestries, national origins or places of birth. In the performance of its duties, the Commission may cooperate with interested citizens and with public and private agencies.

(e) Request other departments of the City government to assist in the performance of its duties, and such other departments shall cooperate fully with the Commission.

(f) Render from time to time, but not less than once a year, a written report of its activities and recommendations to the Mayor and to City Council.

(g) Recommend legislation to promote and

insure equal rights and opportunities for all persons, regardless of their race, color, religion, ancestry, national origin or place of birth.

(h) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this Ordinance.

Section 6. COMMITTEES

The Chairman of the Commission may, with the approval of the Commission, appoint committees to carry out any of the powers and duties of the Commission. Any committee appointed to administer the provisions of this ordinance relating to unlawful employment practices, or to investigate conditions having an adverse effect on intergroup relations or alleged violations of laws of the Commonwealth of Pennsylvania or ordinances of the City, as specified in subsections (b) and (c) of Section 5 of this ordinance, shall consist of not less than five (5) members. Three (3) members of any such committee shall constitute a quorum for the transaction of business, and the majority vote of those present at any meeting shall be sufficient for any official action taken by the committee. Any action taken by such committee shall be deemed to be the action of the Commission, except that approval of the majority of the members of the Commission shall be required before any public hearing may be held and before any alleged violation of a law of the Commonwealth or an ordinance of the City other than this ordinance may be certified to the City Solicitor for action.

Section 7. UNLAWFUL EMPLOYMENT PRACTICES

It shall be an unlawful employment practice, except where based upon applicable national security regulations established by the United States, by the Commonwealth of Pennsylvania, or by any political subdivision of the Commonwealth having jurisdiction in the City of Pittsburgh, or except where based upon a bona fide occupational qualification certified by the Commission to be an occupation or position which reasonably requires the employment of a person or persons of a particular race, color or religion, in accordance with subsection (a) of Section 5 of this Ordinance.

(a) For any employer to refuse to hire any individual or to otherwise discriminate against any individual with respect to hiring, tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(b) For any employer, employment agency or labor organization to establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, the employment or membership opportunities of any group or individual because of race, color, religion, ancestry, national origin or place of birth.

(c) For any employer, employment agency or labor organization to require of any applicant for employment or membership any information concerning race, color, religion, ancestry, national origin or place of birth.

(d) For any employer, employment agency or labor organization to cause to be published or circulated any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth.

(e) For any employment agency to fail or refuse to classify properly or refer for employment or to otherwise discriminate against any individual because of race, color, religion, ancestry, national origin or place of birth.

(f) For any employer substantially to confine or limit recruitment or hiring of individuals, with intent to circumvent the spirit and purpose of this ordinance, to any employment agency, employment service, labor organization, training school, training center or any other employee-referring source which serves individuals who are predominantly of the same race, color, religion, ancestry, national origin or place of birth.

(g) For any labor organization to discriminate against any individual in any way which would deprive or limit his employment opportunities or otherwise adversely affect his status as an applicant for employment or as an em-

ployee with regard to tenure, compensation, promotion, discharge or any other terms, conditions or privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin or place of birth.

(h) For any employer, employment agency or labor organization to discriminate against any individual because he has opposed any practice forbidden by this ordinance or because he has made a complaint or testified or assisted in any manner in any investigation or proceeding under this ordinance.

(i) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

(j) If the provisions of this ordinance are not otherwise violated, it shall not be an unlawful employment practice for any employer to select for employment any person who possesses qualifications, training or experience which best adapt him for the employer's business or profession.

Section 8. PROCEDURE WITH RESPECT TO COMPLAINTS OF UNLAWFUL EMPLOYMENT PRACTICES

(a) A complaint charging that any person has engaged or is engaging in any unlawful employment practice may be made by the Commission itself, by an aggrieved individual, or by an organization which has as one of its purposes the combating of discrimination or the promotion of equal employment opportunities. A complaint must be filed with the Commission within sixty (60) days after the alleged unlawful employment practice.

(b) The Commission shall make a prompt and full investigation of each complaint of an unlawful employment practice.

(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the unlawful employment practice charged in the complaint by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

(d) In case of failure to eliminate the unlawful employment practice charged in the complaint by means of conciliation or persuasion, the Commission shall hold a public hearing to determine whether or not an unlawful employment practice has been committed. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful employment practice, hereinafter referred to as respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the statement of charges. The respondent shall have the right to file an answer to the statement of charges, to appear at the hearing in person or to be represented by an attorney or any other person and to examine and cross-examine witnesses.

(e) If upon all the evidence presented the Commission finds that the person charged in the complaint has not engaged or is not engaging in any unlawful employment practice, it shall state its findings of fact and dismiss the complaint. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful employment practice, it shall state its findings of fact and shall issue such order as the facts warrant.

(f) In the event the respondent fails to comply with any order issued by the Commission, the Commission shall certify the case and the entire record of its proceedings to the City Solicitor for appropriate action to secure enforcement of the Commission's order.

(g) If the Commission finds that any officer or employee of the City, or any contractor or subcontractor doing work for the City, has engaged or is engaging in any unlawful employment practice, it shall report its finding to the Mayor for appropriate action.

Section 9. PERSONS ENTERING INTO CONTRACTS WITH THE CITY

The City of Pittsburgh and all of its contracting agencies shall include in all contracts a provision obligating the contractor to comply with the provisions of this ordinance relating to unlawful employment practices in connection with any work to be performed in the City and requiring the contractor to include a similar provision in all subcontracts for work to be performed in the City.

Section 10. PENALTIES

Any person who violates any of the provisions of this ordinance relating to unlawful employment practices or any rule or regulation pertaining thereto adopted by the Commission, or who fails to comply with any order of the Commission relating to unlawful employment practices, shall be subject to a fine not exceeding one hundred dollars ($100.00) and costs, and in default of payment of the fine and costs shall be subject to imprisonment for a period not exceeding thirty (30) days. Prosecutions under this ordinance shall be instituted only by the City Solicitor and prosecutions may be brought only after a case has been certified to the City Solicitor by the Commission.

Section 11. SEVERABILITY

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons and circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provisions, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

Section 12. SAVING CLAUSE

The provisions of this ordinance, so far as they are the same as those of ordinances repealed by this ordinance, are intended as a continuation of such ordinances and not as new enactments. The provisions of this Ordinance shall not affect any act done or any complaint or proceeding pending under authority of the repealed ordinances. All rules and regulations adopted pursuant to any ordinance repealed by this ordinance shall continue with the same force and effect as if such ordinance had not been repealed.

Section 13. EFFECTIVE DATE

The effective date of this ordinance is July 1, 1955.

Section 14. REPEAL

Ordinance No. 479, approved December 17, 1946, and Ordinance No. 465, approved December 5, 1952, are hereby repealed absolutely. Any other ordinance or part of ordinance, conflicting with the provisions of this Ordinance, be and the same is hereby repealed, so far as the same affects this Ordinance.

Ordained and enacted into a law in Council, this 20th day of June, A. D. 1955.

Thomas J. Gallagher
President of Council

EMPLOYMENT

NAACP Members—South Carolina

Act No. 741 of the General and Permanent Laws of South Carolina, 1956, enacted March 17, 1956, prohibits the employment by the state of South Carolina or any school district or politi-

cal subdivision thereof, of any member of the National Association for the Advancement of Colored People.

An ACT To Make Unlawful The Employment By The State, School District Or Any County Or Municipality Thereof Of Any Member Of The National Association For The Advancement Of Colored People, And To Provide Penalties For Violations.

Whereas, the National Association for the Advancement of Colored People has, through its program and leaders in the State of South Carolina, disturbed the peace and tranquility which has long existed between the White and Negro races, and has threatened the progress and increased understanding between Negroes and Whites; and

Whereas, the National Association for the Advancement of Colored People has encouraged and agitated the members of the Negro race in the belief that their children were not receiving educational opportunities equal to those accorded white children, and has urged the members of the Negro race to exert every effort to break down all racial barriers existing between the two races in schools, public transportation facilities and society in general; and

Whereas, the National Association for the Advancement of Colored People has made a strenuous effort to imbue the members of the Negro race with the belief that they are the subject of economic and social strangulation which will forever bar Negroes from improving their station in life and raising their standard of living to that enjoyed by the White race; and

Whereas, the General Assembly believes that in view of the known teachings of the National Association for the Advancement of Colored People and the constant pressure exerted on its members contrary to the principles upon which the economic and social life of our State rests, and that the National Association for the Advancement of Colored People is so insidious in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, that membership in such an organization is wholly incompatible with the peace, tranquility and progress that all citizens have a right to enjoy. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

No NAACP member to be employed by State:

SECTION 1.

Thirty days after the effective date of this act it shall be unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State, school district, county or any municipality thereof, and such prohibition against employment by the State, school district, county or any municipality thereof shall continue so long as membership in the National Association for the Advancement of Colored People is maintained.

Written oaths may be required regarding NAACP status:

SECTION 2.

The board of trustees of any public school or State supported college shall be authorized to demand of any teacher or other employee of the school, who is suspected of being a member of the National Association for the Advancement of Colored People, that he submit to the board a written statement under oath setting forth whether or not he is a member of the National Association for the Advancement of Colored People, and the immediate employer of any employee of the State or of any county or municipality thereof is similarly authorized in the case any employee is suspected of being a member of the National Association for the Advancement of Colored People. Any person refusing to submit a statement as provided herein, shall be summarily dismissed.

Appeals from dismissals:

SECTION 3.

A person dismissed from, or declared ineligible for, employment under the provisions of this act, may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause before any circuit court of the State why a hearing on such charges should not be had. Until the final

judgment on said hearing is entered, the order to show cause shall stay the effect of dismissal or ineligibility based on the provisions of this act. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of an order of dismissal or declaration of ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or declaration of ineligibility.

Penalties:

SECTION 4.

Any person employing any individual contrary to the provisions of this act shall be subject to a fine of not exceeding one hundred dollars for each separate offense.

Repeal:

SECTION 5.

All acts or parts of acts inconsistent herewith are hereby repealed.

Time effective:

SECTION 6.

This act shall take effect upon its approval by the Governor.

Approved the 17th day of March, 1956.

EMPLOYMENT

Mongolian Labor—U. S. Congress

Public Law No. 517, 84th Congress, enacted May 10, 1956, terminates the prohibition against employment of Mongolian labor in the construction of reclamation projects. That act follows:

AN ACT to terminate the prohibition against employment of Mongolian labor in the construction of reclamation projects.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4 of the Reclamation Act of June 17, 1902 (32 Stat. 389), is hereby amended by inserting a period in lieu of the comma after the word "work" in the proviso of that section and striking out the following language: "and no Mongolian labor shall be employed thereon."

Approved May 10, 1956.

CONSTITUTIONAL LAW

Interposition—Louisiana

House Concurrent Resolution No. 10 of the 1956 session of the Louisiana Legislature, enrolled on May 29, 1956, adopts a resolution interposing the sovereignty of the State of Louisiana against the "encroachment upon the police powers reserved to" the state. That Resolution follows:

A CONCURRENT RESOLUTION

Interposing the sovereignty of the State of Louisiana against encroachment upon the police powers reserved to this State by the United States Constitution and appealing to her sister states to resolve a question of contested powers.

Be It Resolved by the Legislature of Louisiana the Members elected to each House concurring:

That the Legislature of Louisiana express its firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State—as the same were originally adopted and have since been legally amended in the manner prescribed therein—against every

attempt, whether foreign or domestic, to undermine and destroy the great principles embodied therein;

That the Legislature of Louisiana explicitly declares that the powers of the Federal Government result solely from the Constitution of the United States, a compact in which the several States are principals, and that, hence, the powers of the Federal Government, including all of its branches and agencies, are limited by the terms of the instrument creating that compact, and by the plain sense and intention of its provisions;

That the terms of this basic compact, and its plain sense and intention, are that the several States, the principals therein, have agreed voluntarily to delegate certain of their sovereign powers, but only those sovereign powers specifically enumerated, to a Federal Government thus constituted, and that all powers not expressly delegated to the Federal Government by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;

That this basic compact may be legally amended in one way, and in one way only, that is by ratification of a proposed amendment by the Legislatures of not less than three-fourths of the States, pursuant to Article V of the Constitution; that the judicial branch of the Federal Government has authority only in "cases in law and equity arising under this Constitution" and, hence, has no power or authority to amend the Constitution of the United States either by declaring a different meaning for the words therein found or otherwise;

That by its decision of May 17, 1954, in the school cases, the then occupants of the offices of Justices of the Supreme Court of the United States attempted to amend the Constitution by declaring that regardless of the meaning or intention of the Fourteenth Amendment when adopted by the States (which was explicitly shown to be contrary to the decision in these cases) it would be construed, in view of changing conditions, to deprive the several States of authority over their respective public school systems never surrendered by them;

That following this decision a Federal District Court for the State of Louisiana, in the case entitled Bush et al v. Orleans Parish School Board et al attempted to declare unconstitutional certain portions of the Constitution and Statutes of the State of Louisiana, some dealing with segregation of the races in public schools and others dealing simply with the administration of public schools, basing its opinion upon the proposed change in the Constitution of the United States decreed by the Supreme Court in its above mentioned May 17, 1954, decision;

That the Legislature of Louisiana, further, takes cognizance of the fact that under this proposed judicial amendment to the Constitution of the United States, the laws of several of our sister States relating to the segregation of races in public parks and recreational activity have been declared unconstitutional by Federal Courts, and litigation, and threat of litigation, on this score exists in the State of Louisiana;

That the State of Louisiana, and the other States of the United States, have never surrendered the right to regulate their public school system or their public parks and recreational activities, whether in the Fourteenth Amendment or any other provision of the United States Constitution, that hence, if this State fails to clearly assert its power in regard to these matters it might be construed as a tacit surrender thereof and that such submissive acquiescence to palpable, deliberate and dangerous usurpation of such power would, in the end, lead to the surrender of all powers, and inevitably to the obliteration of the sovereignty of the States, contrary to the sacred compact by which this Union of States was created;

That the question of usurped power asserted in this resolution is not within the province of the usurper to determine, and, hence, under these circumstances, the judgment of all the principals to the compact must be sought to resolve the question;

Therefore, the Legislature of Louisiana, appealing first to our Creator as the only Supreme Authority, next appeals to her sister States for that decision which only they are qualified under our mutual compact to make, and respectfully requests them to join in taking appropriate steps, pursuant to Article V of the Constitution of the United States, by which an amendment designed to set at rest the usurpation herein complained of may be proposed to all the States.

And, Be It Further Resolved, that until the usurpation herein complained of by the State of Louisiana be settled by legal Constitutional amendment, the Legislature of Louisiana does hereby solemnly declare the decision of the Supreme Court of the United States of May 17,

1954, the decision of the Federal District Court in the case of Bush et al v. Orleans Parish School Board et al, and any similar decisions that might be rendered in connection with the public school system and public parks and recreational facilities, insofar as such decisions may affect or apply to the sovereign State of Louisiana, to be in violation of the Constitution of the United States, and of the State of Louisiana; and,

We declare, further, our firm intention to take all appropriate measures honorably and constitutionally available to us, to void this illegal encroachment upon the rights of the several States, and we do hereby urge our sister States to take prompt and deliberate action to check further encroachment by the Federal Government upon the reserved powers of each of the States.

The Governor of Louisiana is respectfully requested to transmit a copy of the foregoing resolution to the governing body of every parish, city and town in this State; to the executive authority of each of our sister States; to the clerk of the Senate and House of Representatives of the United States; to Louisiana's Senators and Representatives in the Congress, and to the President of the United States and each of the Justices of the Supreme Court of the United States for their information.

CONSTITUTIONAL LAW

Joint Legislative Committee—Louisiana

House Concurrent Resolution No. 9 of the 1956 session of the Louisiana Legislature, enrolled on May 29, 1956, provides for continuing in operation the Joint Legislative Committee created by H. Con. Res. No. 27, 1954, for the purpose of "carrying on and conducting the fight to maintain segregation of the races" in the state. That Resolution follows:

Whereas the rights and liberties of the people of the United States are threatened as never before by enemies, both foreign and domestic; and

Whereas these enemies have concentrated their attacks upon the States in the South and are there employing what has been described by these enemies as "the Party's most powerful weapon . . . racial tension"; that the success of these subversive forces has been so great that they have been able to pit one section of the country against another, one branch of the Federal Government against the governments of the several states and in many places the people of one race against the people of another; and

Whereas in Louisiana the design of these evil forces has been largely thwarted through the prompt and vigorous action of the Legislature of Louisiana aided by the other branches of the State Government, with the result that the turmoil created by the Black Monday decision of May 17, 1954, has been held in check and relative peace and good will has been maintained among our people; and

Whereas the principal instrument of the Legislature in this fight has been the Joint Legislative Committee created by House Concurrent Resolution No. 27 of the General Assembly of the State of Louisiana for the year of 1954;

Now, therefore, be it resolved by the Legislature of Louisiana, the Senate and House of Representatives concurring, that said Joint Legislative Committee be continued in full force and effect and be appointed for the purpose of carrying on and conducting the fight to maintain segregation of the races in all phases of our life in accordance with the customs, traditions, and laws of our State and in this connection said committee shall make studies, provide information, draft legislation, and in connection with any of the foregoing conduct investigations, hearings and take any and all actions that might be necessary or incidental to carrying out the purposes herein set forth, which committee shall serve with the authority and powers provided by the Constitution of Louisiana; and

Be it further resolved, that the said Joint Legislative Committee be composed of the members previously serving thereon who were re-elected to the Legislature and that the Speaker of the House and the President of the Senate be authorized to appoint members to fill any vacancies on said Committee; and

Be it further resolved, that the said Legislative Committee shall be authorized in pursuit of its duties to call for the production of and

to inspect the books and records, and to secure information and compile data, from the institutions and departments of State government, including parish and municipal governing bodies and school boards, as well as the several departments of the same; and the Committee is authorized to secure the services of statistical, clerical, and other assistance from any of the State Institutions, or departments and from parish and municipal school boards and/or governing bodies to compile data and to make reports deemed necessary by this committee in carrying out its assignment hereunder; and

Be it further resolved that said committee be authorized to employ such help as it may require, including attorneys of its own choosing, provided that all expenses of said committee shall be limited to the amount heretofore or hereafter appropriated for the Joint Legislative Committee.

CONSTITUTIONAL LAW

Anti-Interposition—California

House Resolution No. 16 of the California Legislature, passed on March 15, 1956, memorializes the United States Congress, urging federal action to support the decision of the United States Supreme Court in the *School Segregation Cases*.

Urging federal action to support the Civil Rights Decision of the Supreme Court of the United States.

WHEREAS, Our great American democracy was founded upon the basic concepts of equality and liberty for all which principles are embodied in our Constitution and cherished as the supreme law of our land; and

WHEREAS, These doctrines of equality and freedom have been fountainheads of strength to our Nation which have borne us through our times of trial, nurtured us as a free people who have matured a mighty and thriving civilization, and brought us to an ascendancy among the nations of the earth; and

WHEREAS, There have been reliable reports of serious violations of these American democratic principles in certain of our sister states of the South which threaten the national security, the orderly processes of commerce among the several states, and the welfare of the Nation; and

WHEREAS, According to these reports of this critical situation, the constitutional rights of citizens to vote and engage in the pursuit of happiness, to travel, work and attend school, are violated frequently and often with means of physical violence and terror; and

WHEREAS, These attacks based solely upon bigotry and race prejudice, have in some Southern States achieved the sanction of state governments in the form of nefarious attempts to defy the Supreme Court of the United States and to threaten nullification of the Constitution; and

WHEREAS, Such unlawful acts and overt defiance of the Constitution and the power of the United States Supreme Court are of national concern, regardless of the states in which they occur, and demand the cognizance of all states, as well as the active attention of the Federal Government, because they are repugnant to every moral, religious, and political principle of our great American democracy and seriously weaken the United States in the international conflict between democracy and totalitarianism; now, therefore, be it

Resolved by the Assembly of the State of California, That it memorializes the Executive Branch and Congress of the United States to take the necessary action to support the recent decisions of the Supreme Court on civil rights, by the utilization of available agencies and facilities to maintain peace and order, protect the rights of citizens, and enforce the laws of our land; and be it further

Resolved, That copies of this resolution be sent to the President and Vice President of the United States, Speaker of the House of Representatives, U. S. Department of Justice, and to each Senator and Representative of the State of California in the Congress of the United States.

CONSTITUTIONAL LAW

Supreme Court Jurisdiction—U. S. Congress (Proposed)

H.R. 11795, 84th Congress, Second Session, introduced by Representative Vinson of Georgia on June 14, 1956, proposes to limit, retroactively to January 1, 1954, the appellate jurisdiction of the United States Supreme Court with respect to prior decisions of the Court which have remained in effect for fifty years or more. That proposed bill follows:

To limit the appellate jurisdiction of the Supreme Court of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no decision, judgment, or decree of the Supreme Court of the United States which has remained in effect for fifty years or more shall be subject to review, on appeal or otherwise, except when authorized by an Act of Congress; and no decision, judgment, or decree of the Supreme Court of the United States rendered since January 1, 1954, which reverses, alters, or modifies any decision, judgment or decree of said Court which had remained in effect for fifty years or more shall be of any force and effect.

CIVIL RIGHTS

1956 Bill—U. S. Congress (Proposed)

On May 21, 1956, the Committee on the Judiciary of the House of Representatives reported out H.R. 627 (See 1 Race Rel. L. Rep. 595), a bill to provide additional means of protecting civil rights. Parts of the Committee Report No. 2187, (84th Congress, 2d Session) and the minority reports on that bill follow:

Report To Accompany H. R. 627

The Committee on the Judiciary, to whom was referred the bill (H. R. 627) to provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States, having considered the same, report favorably thereon with amendment and recommend that the bill do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert the following:

[*The text of H.R. 627 was reproduced in full at 1 Race Rel. L. Rep. 595*]

AMENDMENT

The amendment to H. R. 627 is in the nature of a substitute and strikes all after the enacting clause and inserts in lieu thereof new language. The bill as reported contains four principle provisions:

I. Creation of a six-man bipartisan Commission on Civil Rights in the executive branch of the Government with subpena power.

II. Creation of an additional Assistant Attorney General in charge of a Civil Rights Division in the Department of Justice.

III. Supplement to 42 United States Code, section 1985, providing civil remedies against conspiracies which deprive of civil rights.

IV. Provision for a civil remedy brought by the Attorney General to protect the right to vote.

These four provisions make up the civil-rights program submitted to Congress in an executive communication dated April 9, 1956, from the Hon. Herbert Brownell, Jr., Attorney General of the United States, which is appended to this report.

As introduced, the bill included six major provisions:

I. Creation of a five-man Civil Rights Com-

mission in the executive branch without subpena powers;

II. Creation of an additional Assistant Attorney General in charge of a Civil Rights Division in the Department of Justice;

III. Creation of a Joint Congressional Committee on Civil Rights;

IV. Amendments and supplements to existing criminal statutes on civil rights;

V. Amendments and supplements to existing statutes protecting voting rights; and

VI. Prohibition against discrimination and segregation in interstate transportation.

Subsequent references to the bill H. R. 627 will be understood to apply to the bill as reported by the House Judiciary Committee.

General Statement

The ideal of equality under law has always been a great and distinctive American goal. Privilege, whether based on birth or race or religion, has always been alien to the American spirit of freedom and equality. Since our Nation declared its independence in 1776, we have struggled step by step toward this goal of equality under law. For example, step by step since 1776, the basic democratic right to vote for public office has been secured to more and more people. Likewise, generation by generation, our Nation has grown to a mature state of religious tolerance. Great strides also have been made in expanding the opportunity for a fair trial in all the courts of the Nation. In short, the history of America is the history of freedom on the march.

On May 17, 1954, our Nation took another great step toward the goal of equality under law. On that day in the school-segregation cases (Brown v. Board of Education, 347 U.S. 483 (1954)) the Supreme Court of the United States wrote on the pages of the lawbooks what has been known in the hearts of men for many years—racial segregation sanctioned by law is not equality under law. Since then the conscience of America has been stirred by the realization that much can and must be done toward achievement of this great American goal.

H. R. 627 is designed to assist in the achievement of this great goal by strengthening the law-enforcement functions of the Federal Government in the entire area of civil rights. There is no doubt that the more effective enforcement of rights already guaranteed by law will go far toward expanding freedom in the United States. On the one hand, this is done by providing an additional Assistant Attorney General in charge of a new Civil Rights Division in the Department of Justice. On the other hand, the Attorney General is armed by H. R. 627 with additional civil remedies to more effectively enforce certain civil rights. This is particularly true of the right to vote. Finally, a Commission on Civil Rights in the executive branch of the Government is created to determine the precise extent to which deprivation of civil rights is being suffered. These measures were proposed to Congress in an executive communication dated April 9, 1956, from the Honorable Herbert Brownell, Jr., Attorney General of the United States. They had been previously proposed to Congress by President Truman in his message to Congress on civil rights on February 2, 1948.

The purpose of this legislation is clear. It is to make more certain that rights guaranteed by the Constitution and laws of the United States will be enjoyed by all, regardless of race, creed, color, or national origin. It is directed at no particular section of America. Certainly, no area of the country can claim achievement of full equality under law. The Committee on the Judiciary of the House of Representatives recognizes its distinct duty to enact wise legislation which will guarantee that the words of promise spoken by the Constitution will be fulfilled in every corner of the Nation. It is also realized that American leadership of the free world is aided greatly by practical demonstrations of our historic commitment to the ideal of equality under law. To shirk this high responsibility and leave the production of Federal rights to State or local governments would represent, at best, an unjust imposition of Federal duties on these overworked State and local law-enforcement officials and, at worst, dereliction of sworn duty to uphold and defend the Constitution of the United States. Finally, to fail to take appropriate action to provide adequate tools for the protection of rights and privileges guaranteed by the Constitution and laws of the United States would amount to gross faithlessness to

the great American ideal of equality under law.

I. Establishment of the Commission on Civil Rights

Part I of the bill creates a six-man bipartisan Commission on Civil Rights in the executive branch of the Government, with subpena power. It is to be temporary, expiring 2 years after its creation unless extended by Congress. The Commission is directed to investigate allegations that certain citizens are being deprived of the right to vote or are being subjected to unwarranted economic pressures by reason of color, race, religion, or national origin, and to make studies concerning economic, social, and legal developments constituting a denial of equal protection of the laws and to appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution. A paid staff is authorized, as is the use of voluntary services.

This provision for the establishment of the Commission on Civil Rights was submitted to Congress in an executive communication from the Honorable Herbert Brownell, Jr., Attorney General of the United States, dated April 9, 1956. The need for a Commission on Civil Rights in the executive branch of the Government has been recognized for many years. In 1948, President Truman, in a message to Congress, transmitting his civil-rights program, urged the creation of a similar commission in the executive branch of the Government. He said:

> I recommend that the Congress establish a permanent Commission on Civil Rights reporting to the President. The Commission should continuously review our civil-rights policies and practices, study specific problems, and make recommendations to the President at frequent intervals. It should work with other agencies of the Federal Government, with State and local governments, and with private organizations (vol. 94, Congressional Record, pt. 1, p. 928, February 2, 1948).

Also the creation of such a Commission was one of the recommendations of President Truman's Committee on Civil Rights.

More recently, President Eisenhower, in his State of the Union message of January, 1956, called for the creation of such a Civil Rights Commission. He said:

> It is disturbing that in some localities allegations persist that Negro citizens are being deprived of their right to vote and are likewise being subjected to unwarranted economic pressures. I recommend that the substance of these charges be thoroughly examined by a bipartisan Commission created by the Congress. It is hoped that such a Commission will be established promptly so that it may arrive at findings which can receive early consideration. * * *
>
> We must strive to have every person judged and measured by what he is, rather than by his color, race, or religion. There will soon be recommended to the Congress a program further to advance the efforts of the Government, within the area of Federal responsibility, to accomplish these objectives.

II. Additional Assistant Attorney General

Part II of the bill provides for the creation of an additional Assistant Attorney General in the Department of Justice in charge of a new Civil Rights Division. At present in the Criminal Division there is a Civil Rights Section. This Section is responsible for the enforcement of the civil rights statutes. Also, in addition to civil rights statutes, this Section is responsible for the enforcement of the criminal provisions of the Fair Labor Standards Act (29 U.S.C. 201, et seq.), the penalty provisions of the Safety Appliance Acts, dealing with railroads (45 U.S.C. 1, et seq.), the Kickback Act (18 U.S.C. 874), and certain statutes relating to elections.

This provision for an additional assistant Attorney General to direct a Civil Rights Division in the Department of Justice was submitted to the 84th Congress by Attorney General Herbert Brownell, Jr., in the executive communication dated April 9, 1956, previously referred to. This communication indicates that the extreme importance of the enforcement of civil rights matters demands that those responsible therefor have increased authority and prestige. Also it is indicated that the—

> decisions and decrees of the United States Supreme Court relating to integration in the

> field of education and in other areas, and the civil rights cases coming before the lower Federal courts in increasing numbers, are indication of generally broadening legal activity in the civil rights field.

These cases often lend themselves more appropriately to civil rather than criminal remedies. Also an identical recommendation was part of the civil-rights program submitted to the 80th Congress by President Truman in his message to Congress on civil rights dated February 2, 1948 (vol. 94, Congressional Record, pt. 1, pp. 927, 928, Feb. 2, 1948). For these reasons, a separate Civil Rights Division in the Department of Justice under the direction of an Assistant Attorney General is recommended by the Committee on the Judiciary.

III. To Strengthen the Civil Rights Statutes, and for Other Purposes

Part III supplements title 42 United States Code, section 1985, sometimes called the Ku Klux Act, section 1980 Revised Statutes. At present, this act provides a civil remedy in damages to the party injured as a result of conspiracies to deprive of certain civil rights. The act now has three subsections. The first subsection (42 U.S.C., sec. 1985 (1)), establishes liability for damages against any person who conspires to interfere with an officer of the United States in the discharge of his duties and as a result thereof injures another or deprives another of rights or privileges of a citizen of the United States. The second subsection establishes liability for damages against any person who conspires to intimidate or injure parties, witnesses or jurors involved in any Federal court matter or conspires to obstruct the due course of justice in any State court matter with the intent to deny to any citizen the equal protection of the laws if the result of these conspiracies is injury to another or deprivation of another's rights or privileges as a citizen of the United States. The third subsection establishes liability for damages against any person who conspires to deprive another of the equal protection of the laws or of equal privileges and immunities under the laws, or of the right to vote in elections affecting Federal offices if the result thereof is to injure another or deprive another of rights or privileges of a citizen of the United States.

Part III adds 2 new subsections to the 3 subsections now in section 1985. They are designated "Fourth" and "Fifth." The new subsection designated "Fourth" gives to the Attorney General the right to bring a civil action or other proper proceeding for relief to prevent or redress acts or practices which would give rise to a cause of action under the three subsections of section 1985 described hereinabove. This subsection is designed to provide a new remedy to secure the rights presently protected by section 1985. It is not intended to expand the rights presently protected by this section.

The last sentence of subsection "Fourth" is as follows:

> In any proceeding hereunder the United States shall be liable for costs the same as a private person.

This provision is designed to put the United States on the same footing as a private person as to liability for costs in any proceeding under section 1985. To accomplish this, the above express statutory provision is necessary in view of section 2412 (a) of title 28 of the United States Code which reads as follows:

> The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress.

The new subsection designated the "Fifth" makes clear that district courts of the United States have jurisdiction of proceedings instituted pursuant to section 1985 and dispenses with any requirement of the exhaustion of State administrative or other remedies before proceeding under section 1985 in the United States courts. In Lane v. Wilson (307 U.S. 268, 274 (1939)) the Supreme Court of the United States held that there was no requirement that a party exhaust State judicial remedies before resorting to a Federal court for relief pursuant to a Federal civil rights statute. Therefore, as far as State judicial remedies are concerned, this provision is declaratory of existing law.

As to State administrative remedies, this provision changes the law to a certain extent. In Peay v. Cox (190 F.2d 123 (1951)), the Fifth Circuit Court of Appeals ordered colored citizens to exhaust a State administrative remedy before seeking damages and injunctive relief in the Federal district court. The petitioners al-

leged that because of their race and color the registrar had deprived them of their constitutional right to vote by discriminatorily applying State tests for registration. The circuit court said that petitioners should have appealed from the action of the registrar to the board of election commissioners. It ordered that the suit be sent back to the district court with directions that it remain pending there for a reasonable time to permit the exhaustion of State administrative remedies.

The Attorney General recommended this provision in his executive communication on civil rights dated April 9, 1956. The Committee on the Judiciary of the House of Representatives realizes that oftentimes justice delayed is justice denied and that time lost by exhausting State administrative remedies before enforcing federally secured rights in Federal courts can often defeat efforts to secure these rights. For this reason the committee is of the opinion that the requirement of the exhaustion of administrative or other remedies should have no application to cases under this section.

IV. To Provide Means of Further Securing and Protecting the Right to Vote

Part IV of H. R. 627 amends and supplements section 1971 of title 42 of the United States Code, section 2004, Revised Statutes. At present this section reads as follows:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

In addition to this language which becomes subsection (a) of section 1971, part IV of H. R. 627, adds to section 1971 three new subsections, designated (b), (c), and (d).

The present language in section 1971 is a legislative declaration of the right to vote at any election without distinction as to race, color, or previous condition of servitude. There is no sanction expressed in section 1971. However, the rights legislatively declared in this section have been enforced by the sanctions set out in title 42, United States Code, section 1983 (sec. 1979 Revised Statutes) which reads as follows:

> Sec. 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For example, in Chapman v. King (154 F.2d 460 (1946)), plaintiff recovered damages pursuant to the remedy provided in title 42, United States Code, section 1983 (then 8 U.S.C., sec. 43) for deprivation of his right to vote as legislatively defined in title 42, United States Code, section 1971 (then 8 U.S.C., sec. 31). Similarly, by the concatenate use of these two sections, plaintiff secured injunctive relief in Brown v. Baskin (78 F.Supp. 933 (1948), 80 F.Supp. 1017 (1948), affirmed 174 F.2d 391 (1949)).

The provisions designated subsection (b) of section 1971 is a further legislative declaration of the right to vote. This subsection makes clear that it is unlawful for a private individual as well as one acting under color of law to interfere with the right to vote at any general, special, or primary election concerning Federal offices. There is no remedy provided in this subsection. However, the succeeding subsection, designated (c), provides a civil action at the behest of the Attorney General to redress or prevent deviations from the requirements of subsections (a) and (b).

There can be no doubt of the constitutionality of this subsection. To the extent that action under color of law is considered, the constitutional authority of Congress is too clear to warrant discussion, and since U.S. v. Classic (313 U.S. 299 (1941)), there is clear constitutional authority in Congress to legislate concerning any and all elections affecting Federal offices, whether general, special, or primary, as long as they are an "integral part of the procedure of choice or where in fact the primary effectively

controls the choice." Furthermore, to the extent that private or individual action is concerned—that is, action not under color of law whether by one, two, or more persons and whether conspiratorially or otherwise—there can be no doubt of the constitutional authority of Congress to protect the right to vote at all elections, general, special, primary, or otherwise, affecting Federal offices. (Ex Parte Siebold, 100 U.S. 371 (1879).) As far as these Federal elections are concerned, discussion about the reach or limitation of the 14th and 15th amendments is not relevant, the Supreme Court of the United States said in Ex parte Yarbrough (110 U.S. 651, 655 (1884)):

> The reference to cases in this Court in which the power of Congress under the first section of the 14th amendment has been held to relate alone to acts done under State authority, can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by anyone exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the Government itself.

These same well-recognized principles were reemphasized in 1941 by Chief Justice Stone in his opinion in U.S. v. Classic (313 U.S. 299, 314 (1941)), in which he said:

> We come to the question whether that right is one secured by the Constitution. Section 2 of article I commands that Congressmen shall be chosen by the people of the several States by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations where in other respects it is defined, and the mode of its exercise is prescribed by State action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the State entitled to exercise the right. Ex parte Yarbrough (110 U.S. 651); United States v. Mosley (238 U.S. 383). And see Hague v. C.I.O. (307 U.S. 496, 508, 513, 526, 527, 529), giving the same interpretation to the like phrase "rights" "secured by the Constitution" appearing in section 1 of the Civil Rights Act of 1871, title 17, Statutes, section 13. While, in a loose sense, the right to vote for Representatives in Congress is sometimes spoken of as a right derived from the States, see Minor v. Happersett (21 Wall. 162, 170); United States v. Reese (92 U.S. 214, 217-218); McPherson v. Blacker (146 U.S. 1, 38-39); Breedlove v. Suttles (302 U.S. 277, 283), this statement is true only in the sense that the States are authorized by the Constitution, to legislate on the subject as provided by section 2 of article I, to the extent that Congress has not restricted State action by the exercise of its power to regulate elections under section 4 and its more general power under article I, section 8, clause 18, of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." See Ex parte Siebold (100 U.S. 371); Ex parte Yarbrough (supra, 662, 664); Swafford v. Templeton (185 U.S. 487); Wiley v. Sinkler (179 U.S. 58, 64).
>
> Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a State to cast their ballots and have them counted at congressional elections. This Court has consistently held that this is a right secured by the Constitution (Ex parte Yarbrough, supra; Wiley v. Sinkler, supra; Swafford v. Templeton, supra; United States v. Mosley, supra; see Ex parte Siebold, supra; In re Coy, 127 U.S. 731; Logan v. United States, 144 U.S. 263). And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the 14th and 15th amendments, is secured against the action of individuals as well as of states. Ex parte Yarbrough, supra; Logan v. United States, supra. [Emphasis added.]

The substance of subsection (b) was recommended to Congress by the Attorney General in the executive communication dated April 9, 1956. Also, similar legislation was recommended to Congress by President Truman in 1948 in his civil rights program (vol. 94, Congressional

Record, pt. 1, pp. 927, 928, February 2, 1948).

The subsection designated (c) to be added to section 1971 of title 42, United States Code, provides a civil remedy at the behest of the Attorney General to prevent or redress deviations from the legislative declarations of the right to vote spelled out in subsection (a) and subsection (b) of section 1971. The United States is made liable for costs in proceedings under this section the same as a private person. Since the provision as to costs in this subsection is identical to the provision in part III of H. R. 627, the previous explanation in this report applies to this provision also. Likewise, the subsection designated (d) is identical to the subsection designated the "Fifth" in part III of H. R. 627 and the previous explanation of that provision fully applies here. The substance of subsections (c) and (d) were recommended by the Attorney General in his executive communication on civil rights dated April 9, 1956.

No self-respecting people can tolerate invasions of the sacred right of suffrage. The basic democratic right to vote can never be too securely protected. Every possible shield should be employed to guarantee its inviolability. The addition of this civil remedy at the behest of the Attorney General will add greater flexibility to present Federal protections of the right to vote. Accordingly, the Committee on the Judiciary of the House of Representatives strongly urges enactment of this provision.

Executive Communication

There is included at this point in the report the executive communication from the Honorable Herbert Brownell, Jr., Attorney General of the United States directed to the Speaker of the House of representatives, and dated April 9, 1956, relating to civil rights legislation.

[*The letter from the Attorney General to the Speaker of the House of Representatives is identical to the letter sent to the Vice President or President of the Senate, reproduced in full at 1 Race Rel. L. Rep. 597.*]

Changes in Existing Law by H. R. 627 as Reported

In compliance with clause 3 of rule XIII of the House of Representatives, there is printed below in roman existing law in which no change is proposed by enactment of the bill as here reported; matter proposed to be stricken by the bill as here reported is enclosed in black brackets; new language proposed by the bill as here reported is printed in italics:

[*This portion of the Report is omitted.*]

Minority Report on H. R. 627, as Amended

During the War Between the States and immediately thereafter, the 13th, 14th, and 15th amendments were written into the Constitution of the United States, and many laws known as civil-rights laws were enacted. Some of those laws were held unconstitutional by the United States Supreme Court. Some were erased by the action of the Congress. Nevertheless, during all of the intervening years there has remained, and during all of the hearings conducted by Subcommittee No. 2 of the House Committee on the Judiciary, 84th Congress, and now, on the statute books, laws relating to civil rights in such large numbers and so punitive in nature, that it is easy to understand how past Congresses felt that no further legislation in this field was warranted.

The following is a list of some of the civil-rights statutes. Every person who, under color of any law, is deprived of any of his rights under the Constitution and laws, is afforded a civil action at law, in equity, or other proper proceedings, against the person committing the injury (Rev. Stats., sec. 1979, title 42, ch. 21, sec. 1983); a statute providing against exclusion of any qualified citizen from jury service on account of race or color, with the provision that any person charged with any duty in the selection or summoning of jurors who excludes or fails to summon any such person because of his race, color, or previous condition of servitude, be deemed guilty of misdemeanor, and fined not more than $5,000, title 18, section 243; see Revised Statutes, section 722, giving the Federal district courts exclusive jurisdiction of all civil and criminal matters under the laws heretofore

set out: Revised Statutes, section 1980 (title 42, ch. 21, sec. 1985), dealing with conspiracies to interfere with civil rights. This section covers every conspiracy imaginable in the civil-rights field; Revised Statutes, section 1981 (title 42, ch. 21, sec. 1986), providing civil action against any person having knowledge of any wrongs conspired to be done, or about to be done, who neglects to prevent the same, extending the right of action to the legal representatives of anyone killed through conspiracy; title 8, section 49a, conferring jurisdiction in civil and criminal matters under titles 8 and 18 to the district courts; Revised Statutes, sections 1985, 5517, providing that every marshal and deputy shall execute all processes issued under Revised Statutes, sections 1983, 1984 (title 42, ch. 21, sec. 1991), and if he refuses or neglects to diligently act, is liable for a $1,000 fine for the benefit of the aggrieved party; Revised Statutes, section 1987 (title 42, ch. 21, sec. 1991), providing fees for officers' services in such cases; Revised Statutes, section 1988 (title 42, ch. 21, sec. 1992), empowering the President, when he has reason to believe that offenses of sections 5506-5516 and 5518-5532, Revised Statutes, have been or are likely to be committed, may direct the judges, district attorneys, and marshal to conduct speedy trials; Revised Statutes, section 1989 (title 42, ch. 21, sec. 1993), giving the President the power to employ the land or naval forces or militia, to aid in the execution of judicial processes; also see pages 174-176, civil-rights hearings, Subcommittee 2, House Committtee on the Judiciary, 1st session, 84th Congress, for other statutes; also see the laws relating to the right to vote and other rights referred to in the majority report on this pending legislation.

[*No Official Insistent*]

Under the present laws relating to civil rights the Justice Department has been so heavily engaged in the investigation of groundless complaints, using the FBI to conduct such investigations, we wonder whether or not the FBI has been able to diligently pursue and investigate the cases involving the national security, and offenses designed to violently overthrow our Government. Certainly this poses a question of vital importance.

So far as the undersigned have been able to discover, no Governor or State attorney general has been insistent upon enlarging the field to be covered by civil rights. Nor have any of the appellate or trial court judges of the various States contended that the existing civil-rights statutes are not as full as reason would permit.

On July 13, 14, and 27, 1955, hearings were conducted before Subcommittee 2, House Judiciary, on 53 civil-rights bills as shown by printed hearings, Serial 11, 84th Congress, 1st session. No State officers appeared at said hearings, indeed, they were not invited. These hearings consisted of testimony and statements by Members of Congress who had introduced or supported civil-rights legislation, plus testimony or statements from the following: Chairman of the national civil rights committee, Anti-Defamation League of B'nai B'rith, accompanied by the director, Anti-Defamation League of B'nai B'rith, Washington, D. C.; executive secretary of the NAACP, New York, accompanied by the director of the Washington Bureau, and counsel of the bureau; general counsel, American Jewish Congress; executive director, American Veterans Committee; secretary-treasurer, International Union of Electrical, Radio, and Machine Workers, CIO; codirector of the fair practices and antidiscrimination department, UAW-CIO, accompanied by national representative, UAW-CIO; legislative representative, Americans for Democratic Action; director, American Council on Human Rights; W. Astor Kirk, who said he was appearing as a private witness, although a professor of government at Huston-Tillatson College, Austin, Tex.; Washington representative, Japanese-American Citizens League; statement of the National Community Relations Advisory Council, the statement reciting that it represented the combined and joint views of the constituent organizations as shown on pages 360-361 of hearings; also, statement by the National Lawyers Guild, National Council of Jewish Women, Inc., Womens International League for Peace and Freedom, and the American Civil Liberties Union.

Every Federal governmental agency was invited to appear and testify. Only the Housing and Home Finance Agency Administrator did appear, and his testimony will be found in the hearings heretofore referred to, and there was absolutely nothing in his testimony to indicate any need for further civil-rights legislation. There were many complaints by witnesses over the fact that the governmental agencies did not appear and testify.

[*Proponents Testify*]

Only proponents of this pending legislation appeared and testified, with the exception of the Housing and Home Finance Agency Administrator, and with the exception of the Administrator's testimony, there was no testimony that would have been admissible in any court, the testimony being completely hearsay, rumor, wild, and unsubstantiated charges. These rumors and hearsay charges were against State governments, officers of State governments, private individuals, and charges that the FBI had not and could not investigate those charges because of limitation of the law. The FBI was not brought in to give substance to any of those charges. None of the governors or law officers of the States that these wild charges were directed against were invited to testify, indeed, they were never notified that these charges were made. The undersigned know of particular instances where those charges were untrue, and had the State officials been permitted to make answer to those charges, it is probable that virtually all of those charges would have been proven incorrect. We also believe that the FBI was in a position to prove that many of the charges were incorrect. These hearings were ex parte in the extreme. Hearings are justified for the reason that it is highly important that legislators know the truth. It follows that ex parte hearings can never suffice, and a one-sided investigation is worse than no investigation. When these hearings were held in July 1955, the hearings on July 13 lasted about 2 hours, the subcommittee adjourning to consider the Texas City disaster claims. (See p. 211 of hearings.) See said hearings on pages 213-234, showing what the subcommittee heard on July 14. See pages 235-385 of hearings on July 27, which concluded said hearings. We rest our case with history, as to whether or not a proper hearing was accorded the Congress and the American people on this legislation.

There was inserted in the record of these hearings (1955, pp. 147-159 of hearings), a statement and analysis of the then Attorney General, Hon. Tom Clark, concerning proposed civil-rights legislation before the Committee on the Judiciary, 81st Congress. Certainly that opinion stated in the most favorable light possible the legality of the proposed legislation, with the report following upon the heels of the report of the Truman Civil Rights Commission. Yet, Mr. Clark demonstrated that he had some doubts concerning the legality thereof. Page 158 shows the startling admission of Mr. Clark, to wit:

> Following the Civil War a number of civil-rights statutes were enacted, but over the years, through decisions of the Supreme Court and congressional action in 1894 and 1909, the laws implementing the three amendments (13th, 14th, and 15th amendments) were reduced in number and scope.

Page 179 contains another startling admission from Mr. Clark:

> It is true that there is a line of decisions holding that the 14th amendment relates to and is a limitation or prohibition upon State action and not upon acts of private individuals.

[*Clark Views Recalled*]

Mr. Clark realized that the United States Supreme Court had rendered decisions holding the omnibus legislation he was discussing to be unconstitutional. He cited civil-rights cases, 109 United States 3; U.S. v. Harris (106 U.S. 629); U.S. v. Hodges (203 U.S. 1). One understands the doubt of Mr. Clark. Hodges v. U.S. (203 U.S. 1), completely declares that the 14th and 15th amendments operate solely on State action and not on individual action, and that the remedy for wrongs committed by individuals on persons of African descent is through State action and State tribunals and that the 10th amendment is not shorn of its vitality. The other cases cited by Mr. Clark were so completely against his argument and so utterly opposed this present legislation, that Mr. Clark felt that the legislation might be materially helped legally by the law of nations, the treaty powers, and the United Nations Charter (see p. 179 of hearings).

In 1956, the President, in his state of the Union message, called for the creation of a Civil Rights Commission to study certain charges. But that is all that the President asked for. Apparently the President did not think that the truth was already known and established, and that a thorough investigation should be made. Early in March of 1956, subcommittee 2 started

consideration of the pending civil rights bill, but at no time heard any further testimony. That subcommittee was informed that the Justice Department wished to make recommendations on civil rights legislation, and the Attorney General was invited to testify. On one occasion, the Attorney General was expected but he did not come, although he had been invited by letter and his Department was called by telephone reminding him of the engagement. In early April 1956, the subcommittee, without hearing any further testimony, favorably reported H. R. 259 and H. R. 627 to the committee, preserving the right of the Attorney General to thereafter appear and testify. On April 10, 1956, the Attorney General did appear before the committtee, made a statement and answered questions propounded to him. The testimony of the Attorney General is made a part of the record. Prior to his appearance, bills had been introduced containing his recommendations, and were before the committee when he testified. He said that a Commission was necessary because—

> The need for more knowledge and greater understanding of these most complex and difficult problems is manifest.

It is notable that irrespective of the citations of authority contained in the majority report to the contrary, the Attorney General was of the opinion that he had no right to apply to the courts for preventative relief, and that he did not consider the law settled that he could proceed in the name of the United States in the district courts without first showing that all State administrative and judicial remedies had been exhausted. It is true that there are some Supreme Court decisions saying that proceedings can be brought without exhausting State judicial remedies, but it is evident that the Attorney General did not place much faith in those decisions, he evidently realizing that there are many decisions of the same Court requiring State judicial remedies to be exhausted. The truth is that the Supreme Court has overturned so many sound decisions, that no lawyer is prepared to accept recent decisions as the true law. Certainly the statement of Simon E. Sobeloff made to a Senate committee considering his nomination as a Federal court judge is interesting. Senator O'Mahoney propounded a question to Mr. Sobeloff regarding Supreme Court decisions, and Mr. Sobeloff replied: "Don't you think I have enough trouble without commenting on that?" It is a matter of common knowledge that in the past few years our Supreme Court has rendered so many decisions contrary to precedents that no one accepts those decisions as settled law. Smith v. Allwright, 321 U.S. 649-670 (a civil-rights case) illustrates this point. In that decision, the Supreme Court was confronted with its decision in Grovey v. Townsend, 295 U.S. 45, the State of Texas having modeled its laws to conform to that decision. Nevertheless, the Supreme Court, though virtually confessing that the State of Texas had completely complied with its rules, reversed itself, and on page 665 said "This Court has never felt constrained to follow precedent." Then the Supreme Court, in a footnote, proceeded to demonstrate by citing innumerable decisions that precedents did not bother them at all. Pages 668-670 of that decision contain the dissent of Justice Roberts. Mr. Roberts lamented the fact that the Supreme Court decisions had arrived at the point that they were in "the same class as a restricted railroad ticket, good for this day and train only." Also:

> I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by Justices who deem they have new light on the subject. In the present term, the Court has overruled three cases.

Page 670 contains this thoughtful statement by Justice Roberts:

> It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court, which has been looked to as exhibiting consistency in adjudications and a steadfastness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public minds as to the stability of our institutions.

Certainly the Supreme Court has done nothing during the intervening years between Justice Roberts' tenure on the bench and now to cause anyone to believe that it has not continued to create instability in our institutions. Actually, it has added confusion to confusion.

The majority report, in its general statement, says that "On that day in the school segregation cases (Brown v. Board of Education, 347 U.S. 483, 1954), the Supreme Court of the United States wrote on the pages of the law books what has been known in the hearts of men for many years." What has been known in the hearts of men is highly debatable, but the portion of that assertion to the effect that the Supreme Court "wrote on the pages of the law books" unfortunately is completely true, and there is no doubt that the Court wrote that law. Additionally, and maybe this was a precedent, that Court cited books and opinions of writers which could not have been admissible as evidence in any court, and substituted sociology for law. On April 30, 1956, that Court astounded the world by its decision in the case of the Communist Party of the U. S. v. Subversive Activities Control Board. Justice Clark, Justice Reed, and Justice Minton, in a vigorous dissent to the majority opinion reversing that case, said that never before had allegations so flimsily supported been considered grounds for reopening a proceeding or granting a new trial. Also, they said:

> In at least three cases this term we declined to review State criminal convictions in which much stronger allegations of perjury were made.

Additionally, they said:

> This proceeding has dragged out for many years now, and the function of the Board remains suspended and the congressional purpose frustrated at a most critical time in world history.

It has also been said that the majority opinion in that case was the greatest victory the Communist Party had yet achieved in America.

Immediately after Attorney General Brownell testified before the full committee on April 10, 1956, the full committee started consideration of H. R. 259 and H. R. 627, both having been favorably reported to the full committee, and also consideration of the bills prepared to carry out the views of the Attorney General. The full committee ascertained that no study had been made by Subcommittee 2 on the grave constitutional questions involved, and the full committee referred all these bills back to Subcommittee 2 for the purpose of a thorough study of the constitutional questions and legal questions involved. The next day subcommittee 2 met, and without any study whatsoever and in a matter of minutes, by a majority vote voted to favorably report H. R. 259 and H. R. 627 to the full committee. At the next committee meeting, H. R. 259 was first considered and tabled, and on consideration of H. R. 627, which was an omnibus civil rights bill, the full committee struck everything except the enacting clause and substituted the provisions shown in the report of the committee to the House. Therefore we now shall discuss the provisions of that bill.

[*Part I Discussed*]

Part I relates to the establishment, compensation, duties, powers, and appropriations for a Commission on Civil Rights. Establishment of civil rights commissions is certainly not new. We all remember the Truman Civil Rights Commission. If a Presidential civil rights commission is not in existence now, the President can create one any time. If there is to be any such commission, it would seem that the fairest approach would be for the President to set up that Commission. The material difference between a commission set up by the President and this proposal is that a Presidential commission does not have broad subpena powers, whereas this proposed legislation does give to the Commission full subpena powers, and provides for punishment for any person who fails to obey that summons. This Commission would have the right to subpena any person to appear and testify in Washington or any other remote place, and evidently at that person's expense, as no travel pay or per diem allowances are therein provided for. No one could furnish any evidence or estimate as to what this Commission would cost the taxpayers. We do know that $50 per day is lawful for the Commission members, staff director, and such personnel as the Commission deems advisable and may use the services of other persons who would draw a per diem allowance not in excess of $12 per day. If the past is any criterion, this voluntary assistance would probably be the NAACP, American Civil Liberties Union, and others (p. 161, 1955 hearings). It is reasonable to assume that such personnel would be partisan. The duties prescribed for this Commission open up Pandora's box. It is empowered to investigate all allega-

tions that persons are deprived of the right to vote or subjected to unwarranted economic pressure by reason of their color, race, religion, or national origin, besides other enumerated duties. Anyone knows that in the field of education complaints will utilize this Commission in a manner and volume heretofore unknown to any Government agency. It is a known fact that more unreasonable complaints are made in the field of civil rights than in any other field. See pages 176-177 of 1955 hearings, appendix B, furnished by Hon. Tom Clark. That shows that in 1940, 8,000 civil-rights complaints were received, with prosecutions recommended in 12 cases, including Hatch Act violations. In 1942, 8,612 complaints were received and prosecutive action taken in 76 cases, the report being silent as to the number of convictions. In 1944, 20,000 complaints were received and 64 prosecutions undertaken, but it is not revealed how many were convicted.

Part II of this proposed legislation is known as the additional Assistant Attorney General provision. Under this proposal, a special civil-rights division would be set up, involving staff and clerical help and many, many assistants to the Assistant Attorney General. How many assistants to the Assistant Attorney General will be required? Mr. Maslow, general counsel, American Jewish Congress, in his testimony in July 1955, said this division should have 50 lawyers in it. Mr. Maslow's estimate is most conservative, inasmuch as parts III and IV of this proposed legislation make the United States the parent and guardian of all groups covered by this legislation, and the pursuer of all other citizens not embraced in that legislation. Inasmuch as this proposed legislation would provide that the Attorney General can, without any requirement that state judicial or administrative remedies be exhausted, go into the courts of this Nation with or without the consent of the complainant, then no one can estimate how many lawyers will be required at the taxpayers' expense. The majority report makes it crystal clear that part II of this legislation is designed so that the Federal Government may invade all of the States and subdivisions in matters relating to integration, the field of education, and even interstate and intrastate matters, including primary elections. In other words, according to the majority report, all decisions of the United States Supreme Court in the last few years will be rapidly enforced through this medium. Certainly this would be a Frankenstein and a constant threat to any State or local government and to virtually every officer and agent of such governments.

[*Novel Principles*]

Part III of this proposed legislation brings new and novel principles, which, when fully appraised, are absolutely shocking. To empower the Attorney General in the name of the United States but for the benefit of the party in interest to institute civil actions or other proceedings for redress, preventive relief, temporary injunction, restrictive order, or other order, and recover damages or other relief for the party in interest, and even before State remedies have been exhausted, would devastate the principles of States rights. Further, it will afford to certain groups of citizens free of cost all legal representation and costs of litigation, while creating cost for the legal services and litigation so far as States and their officers and agents are concerned. It will mean that the Attorney General may institute litigation without the knowledge and even without the consent of the person designated as the party in interest. The party in interest may feel that he has no complaint, but some pressure organizations can insist that he does, and are free to importune the United States to institute such proceedings. Why single out civil-rights cases as the exception to the time-honored and salutary requirement that State remedies be exhausted, while leaving every other type of case subject to that requirement? Why include primary elections in this legislation? So far as the undersigned know, this is the first time primary elections have been included.

Subsection (b) of part IV would be a new provision. A casual examination shows the dangers inherent in such legislation, and additionally, the loose language employed. What does the language "or otherwise" mean? Is that a catch-all phrase, and does that mean that this covers every instance and every imaginable conception of intimidation, or attempted intimidation? It may be that any candidate for any of the offices named would be risking violation of that provision in an innocent conversation with the voter. Then too, is it not possible that a complainant could institute an action in a State court for redress, and desire State adjudication,

but the Attorney General could institute a proceeding in the Federal court, and the defendant be in the awkward position of having to litigate in two separate courts on the same subject and at the same time? Or, would this new legislation mean that all State laws on this subject would be annulled upon the theory that this Federal legislation had preempted the field? On April 2, 1956, the United States Supreme Court in the case of Commonwealth of Pennsylvania v. Steve Nelson, ruled that the sedition laws of Pennsylvania and the other States were void because the Federal Government had legislated upon that subject. Truly, that decision was astounding, but actually was nothing new. In The Cloverleaf Butter Company v. Patterson (315 U.S. 148), the Supreme Court held that the commission of agriculture of Alabama was without authority to seize packing stock butter which was intended to be manufactured into renovated butter, although he was acting under State authority, for the reason that the State law was in violation of the national supremacy rule. It is interesting to note that many of the advocates of this proposed civil-rights legislation are now opposing H. R. 3, H. R. 10335, and H. R. 10344, all pending before the House Committee on the Judiciary, and all designed to correct the Pennsylvania v. Nelson case.

[*States' Position*]

Their opposition to this legislation is based upon the argument that the States should have no right to legislate in the field of sedition, and certainly it is fair to assume that their real opposition is upon the broad ground of centralization of power, and that the States should be bypassed and ignored. If this legislation is passed, State officials will be met at the threshold with constant litigation. Anyone attempting to perform the duties of a jury commissioner, registrar of voters, school administration, or duties of interstate or intrastate character, must understand that they will be harassed with endless suits by the Government, pressure organizations, and individuals.

Subsections (c) and (d) and part IV are all subject to the same arguments presented as to subsection (b).

That there are grave constitutional questions as well as practical and logical objections to this proposed legislation is seen in the decisions referred to by Hon. Tom Clark, and many other decisions rendered by the Supreme Court. This proposed legislation does not contain any recitals to the effect that treaty law, executive agreements, and the United Nations Charter shall be invoked to make this legislation valid, but no such recitals are necessary. Everyone knows that these arguments would be urged before the courts any time this legislation is attacked. See Oyama v. California (332 U.S., pp. 633-689, particularly pp. 649-650), where Justices Black and Douglas said:

> There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this Nation be faithful to this international pledge if State laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?

In the same case, see page 73, wherein Justices Murphy and Rutledge said:

> Moreover, this Nation recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.

President Truman's Civil Rights Commission was thoroughly familiar with the fact that treaty and executive agreements could override our Constitution. In its report of 1947, page 47-135, we read the type of legislation that group advocated, and the statement:

> It is true that the Federal Government does not possess broad, clear-defined delegated powers to protect civil rights which it may exercise at its discretion, a detailed examination of the constitutional aspects of the civil-rights problem makes clear that very real difficulties lie in the way of Federal action in certain areas.

But, they point out:

> In its decision in Missouri v. Holland in 1920, the Supreme Court ruled that Congress may enact statutes to carry out treaty obligations, even where in the absence of a treaty, it has no other power to pass such a statute. This doctrine has an obvious import as a possible basis for civil-rights legislation.

And, they say:

> The Human Rights Commission of the United Nations is at present working on a detailed international bill of rights designed to give more specific meaning to the general principle announced in article 55 of the Charter. If this document is accepted by the United States as a member state, an even stronger basis for congressional action under the treaty power may be established.

U. S. v. Pink (315 U.S. 203,) extended the treaty doctrine announced to executive agreements. In 1954, an effort was made to discover the number and importance of executive agreements in force, and this resulted in the information that it would take about 9 months' work to supply a list of executive agreements which were never submitted to the Senate. We do not now know whether there are treaties or executive agreements that would legalize all laws that might be passed in the field of civil rights legislation.

In the general statement of the committee report, there is a statement to the effect that to leave to the States or local governments the protection of these rights would be an unjust imposition of Federal duties on "these overworked State and local law enforcement officials." It is our opinion that it is in the Federal courts that the law enforcement officials are overworked. Ever since the undersigned have been Members of this body, they have, in common with the other Members, been faced with legislation every year calling for more Federal judges, the excuse being that these Federal judges are hopelessly behind with their caseloads. On the other hand, the State courts have been bypassed to such an extent that we feel certain that many of the rights they once enjoyed should be restored. Certainly no one will argue now that our laws are administered more judiciously on the Federal level than on the State level.

This minority report is for the purpose of attempting to show that this legislation, although intended by some to be sectional, is of national scope and significance, and that no such legislation should be passed in this field until the need is clearly proven by competent testimony, and until its constitutionality has been thoroughly studied, and until the rights of the States have been fully considered and preserved.

E. L. Forrester.
Woodrow W. Jones.
Robert T. Ashmore.
James B. Frazier, Jr.
Wm. M. Tuck.
Richard H. Poff.
E. E. Willis.

Additional Minority Views on H. R. 627

By reason of an extension of time granted the minority, we append hereto the following additional minority views on H. R. 627:

The real issue presented by this legislation is whether Federal authority should be expanded to reach matters which have historically been within the jurisdiction of the States and the people.

The Commission on Civil Rights is directed to investigate allegations concerning deprivations of the right to vote and allegations concerning the exercise of unwarranted economic pressures by reason of color, race, religion, or national origin. The provision for an additional Assistant Attorney General is necessary, we are told, because of decisions and decrees of the United States Supreme Court relating to integration in the field of education.

The third part of this legislation would give the Attorney General authority to bring suits under the Criminal Conspiracy Statutes, section 1980 of the Revised Statutes. Under present law only a private citizen has a right to bring such suits. Finally, this legislation expands Federal jurisdiction over regulation of the right to vote. Every one of these provisions calls for expansion of Federal jurisdiction into areas historically reserved to the States or to the people.

Part I. The Commission on Civil Rights

The Commission on Civil Rights in the executive branch of the Government is primarily designed to investigate allegations concerning deprivations of the right to vote and to investigate allegations concerning unwarranted economic pressures by reason of the color, race, religion, or national origin of the victim. It is also to study the general situation regarding equal protection of the laws under the Constitution.

It is axiomatic that the Federal Government should have authority to conduct investigations only in those areas in which it has delegated authority to act. The authority of the Federal Government concerning the right to vote is a distinctly limited one and these limitations will be discussed later in part IV of this report. It is clear, however, that the Commission is authorized to investigate election matters over which the Federal Government has no constitutional authority. Therefore, it would not only be unwise but unconstitutional to create this Federal Commission to investigate any and all deprivations of the right to vote. As to investigations concerning unwarranted economic pressures, this also is not only clearly unwise, but, in addition, is clearly unconstitutional.

This precise question of economic pressures was presented to the Supreme Court of the United States in Hodges v. United States (203 U.S. 1 (1906)). Defendants in that case were convicted of conspiring to injure, oppress, threaten, or intimidate Negroes in the exercise or enjoyment of rights or privileges secured by the Constitution or laws of the United States. This conviction grew out of threats and violence by the defendants to force the Negro victims to abandon their particular jobs in violation of the Civil Rights Enforcement Act of 1870. The Supreme Court of the United States reversed the convictions and ordered the indictments dismissed on the ground that Congress had no constitutional authority over the protection of individual jobholders from oppression by other private individuals. The Court said that this was a matter reserved to the States and to the people. The opinion in the case examines the relationship of the Federal and State Governments in this area of civil rights, discusses the Slaughter House cases (16 Wall. 36, 76) and concludes that whatever economic rights were involved in the case were secured by the States and not by the Federal Government. The Hodges case clearly condemns as unconstitutional Federal intervention in this general area of economic oppression.

Finally, a word should be said about the grant of subpena power to the Commission. This is an extraordinary power seldom, if ever, conferred upon commissions in the executive branch of the Government. The extraordinary character of this subpena power is indicated by the fact that this Committee on the Judiciary of the House of Representatives which has jurisdiction over legislation in this area has no subpena power in civil-rights matters. It is indeed anomalous then for us to authorize the grant of such power to a purely executive commission.

The creation of this Commission is inconsistent and contradictory of the remaining provisions of the bill. Since it is alleged necessary to create the Commission to investigate deprivations of civil rights and to submit reports thereon, why in the same legislation should it be necessary not only to create a new Civil Rights Division in the Department of Justice, but also to enact into law new provisions whose broadness and indefiniteness may open a Pandora's box? If the creation of a Commission is considered to be appropriate why proceed at the same time with additional legislation? If Congress is entitled to the views of the Commission why should not Congress await the report of the Commission before acting on the very subjects that the Commission is allegedly designed to study? If the Commission is to act independently why should we tie its hands before its creation?

Part II. Additional Assistant Attorney General

The authorization of an additional Assistant Attorney General to be in charge of a new Civil Rights Division in the Department of Justice involves a further attempt to expand Federal authority into areas traditionally reserved to the States and to the people. The executive communication on civil rights from the Attorney General dated April 9, 1956, indicates that a new Civil Rights Division, rather than the present Civil Rights Section in the Criminal Division, is necessary mainly because of the increased activity attending the Supreme Court decisions

concerning integration in the field of education and in other areas. These are matters clearly within the traditional and appropriate jurisdiction of the States. To intrude the Federal Government into this field was a mistake by the Supreme Court which should not be duplicated by the Congress.

Not only is it unwise to expand Federal authority in this area but cold, hard statistics make it difficult to understand why civil rights matters of all the functions of the Criminal Division in the Department of Justice should demand a separate division. The number of civil rights matters handled by the Criminal Division is one of the least of any category of offenses. There would be much more justification for a new and separate division for almost any other category of matters now within the jurisdiction of the Criminal Division. For example, in the year ending June 30, 1955 the Civil Rights Section processed a total of 3,271 investigative matters. Less than two-thirds of this number pass beyond this preliminary stage and very, very few ever reach court. On the other hand, during this same period the Federal Government commenced 3,413 criminal proceedings in United States district courts involving stolen motor vehicles; there were 1,870 such cases commenced concerning narcotics; 8,550 cases concerning fraud and other thefts; 1,171 cases involving juvenile delinquency; and 1,017 cases involving Selective Service Acts. A new and separate Division in the Department of Justice would be more justified for any of these than for civil rights matters.

Part III. Amendments to the Criminal Conspiracy Statute

Part III of H. R. 627 consists of amendments to the Criminal Conspiracy Statutes, section 1980 of the Revised Statutes (42 U.S.C. 1985). These amendments would intrude high officials of the Federal Government into matters which are now remedied by private actions for damages. Part III adds to the present private action in damages in civil action at the behest of the Attorney General. The Attorney General could proceed not only for damages but also for injunctive relief. He could proceed whenever anyone was "about to engage in any acts or practices which would give rise to a cause of action pursuant" to section 1985. He could proceed apparently whether the alleged victim wished it or not. And he could proceed even though parties had failed to exhaust State remedies available to them.

Congress is asked to confer this extensive power on the Attorney General and yet no clear reason is given for its need. In the first place, section 1985 as presently worded is unclear and of doubtful constitutionality. As the United States Supreme Court said in Collins v. Hardyman (341 U.S. 651, 656 (1951)):

> This statutory provision has long been dormant. It was introduced into the Federal statutes by the act of April 20, 1871, entitled, "An act to enforce the provisions of the 14th amendment to the Constitution of the United States, and for other purposes." The act was among the last of the reconstruction legislation to be based on the "conquered province" theory which prevailed in Congress for a period following the Civil War. This statute, without separability provisions, established the civil liability with which we are here concerned as well as other civil liabilities, together with parallel criminal liabilities. It also provided that unlawful combinations and conspiracies named in the act might be deemed rebellions, and authorized the President to employ the militia to suppress them. The President was also authorized to suspend the privilege of the writ of habeas corpus. It prohibited any person from being a Federal grand or petit juror in any case arising under the act unless he took and subscribed an oath in open court "that he has never, directly or indirectly, counseled, advised, or voluntarily aided any such combination or conspiracy." Heavy penalties and liabilities were laid upon any person who, with knowledge of such conspiracies, aided them or failed to do what he could to suppress them.
>
> The act, popularly known as the Ku Klux Act, was passed by a partisan vote in a higly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction.
>
> The provision establishing criminal conspiracies in language indistinguishable from that used to describe civil conspiracies came

to judgment in United States v. Harris (106 U.S. 629). It was held unconstitutional. This decision was in harmony with that of other important decisions during that period by a Court, every member of which had been appointed by Presidents Lincoln, Grant, Hayes, Garfield, or Arthur—all indoctrinated in the cause which produced the 14th Amendment, but convinced that it was not to be used to centralize power so as to upset the Federal system.

Congress has not been advised for what purpose the Attorney General wishes revitalization of this legislation by the vague power authorized by part III of H. R. 627.

The executive communication on civil rights legislation, dated April 9, 1956, from the Attorney General is cryptic. All it says about this legislation is as follows:

> Under another civil rights statute (sec. 1985 of title 42 of the United States Code) conspiracies to interfere with certain rights can be redressed only by a civil suit by the individual injured thereby. I urge consideration by the Congress and the proposed Bipartisan Commission of a proposal authorizing the Attorney General to initiate civil action where necessary to protect the rights secured by that statute.

When the Attorney General appeared before the House Judiciary Committee his only comments on this provision were as follows:

> Congress could authorize the Attorney General to seek civil remedies in the civil courts for the enforcement of civil rights by a simple amendment to section 1985 of title 42, United States Code. At the present time that statute authorizes civil suits by private persons who are injured by acts done in furtherance of a conspiracy to prevent officers from performing their duties, to obstruct justice, or to deprive persons of their rights to the equal protection of the laws and equal privileges under the laws.
>
> So we think that a subsection could be added to that statute which would give authority to the Attorney General to institute a civil action for preventive relief whenever any person is engaged or about to engage in acts or practices which would give rise to a cause of action under the present provisions of the law.

It is very unwise for Congress to confer extraordinary powers on the Attorney General with only the vaguest notion of the purpose for which these powers will be employed. To do so by such vague language as is included in part III of H. R. 627 approaches recklessness. Although unwarranted, it is entirely probable that some may consider title 42 United States Code, section 1985, applicable to matters involved in enforcing the Supreme Court's orders in the school segregation cases. That is no justification for it. Some think the language of subsection C of 1985 relating to the "equal protection of the laws" or "equal privileges and immunities under the laws" can be applied to such school situations. No doubt it will be done by those responsible for the enforcement thereof. The indefiniteness of the provisions involved coupled with the plentitude of the powers conferred indicates that the enactment of H. R. 627 would be very unwise.

Anyone who has taken the time to read the testimony of the Attorney General cannot help but realize that the fundamental purpose of enacting these provisions is to permit the Federal Government to enter into a field which had formerly been reserved for private persons. It is the medium by which the Federal Government can seek to accomplish by civil process what heretofore it could not do, even on a more limited basis, by the criminal process. The real purpose of the enactment of all the proposals in the pending measure in one package was revealed in a subtle way by Attorney General Brownell in his testimony before the House Committee on the Judiciary in executive session. He developed his theme to the effect that the objectives he had in mind could be more effectively achieved through civil proceedings than by amendment of the criminal statutes. Why? On page 18 of his testimony, the Attorney General lets the cat out of the bag. He pointed out that the Supreme Court, in the case of Screws v. United States upheld the constitutionality of section 242 of title 18, United States Code, by writing in the word "willful" as part of the offense and then he goes on to say that to prove willfulness makes prosecution too burdensome. It is for this reason we submit that the Department of Justice brings forth the

idea that the goals to be achieved can better be accomplished by the injunctive process.

PART IV. REGULATION OF VOTING

Throughout the history of our country, regulation of voting has been traditionally and appropriately a function of the States. In fact, the intrusion of the Federal Government into the regulation of voting has been generally considered unconstitutional except in those instances precisely defined in the 14th and 15th Amendments. In Minor v. Happerset (88 U.S. 162 (1874)), Mrs. Minor was refused registration to vote for electors for President and Vice President of the United States, and for a Representative in Congress at the general election held in November 1872. She was refused because the Missouri Constitution authorized voting by *male* citizens only. Mrs. Minor contended that the right to vote at elections affecting Federal offices was a right and privilege secured to her by the Constitution of the United States which could not be abridged by the State of Missouri.

The Court said:

> If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri confining it to men are in violation of the Constiution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.
>
> The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case one need not determine what they are, but only whether suffrage is necessarily one of them. [Emphasis added.]
>
> It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The Members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State legislature. Senators are to be chosen by the legislatures of the States, and necessarily the members of the legislatures required to make the choice are elected by the voters of the State. Each State must appoint in such manner, as the legislature thereof may direct, the electors to elect the President and Vice President. The times, places, and manner of holding elections for Senators and Representatives are to be prescribed in each State by the legislature thereof; but Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators. It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.
>
> The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen (Minor v. Happerset, 88 U.S. 162, 170 (1874)).

Finally the Supreme Court said:

> Certainly, if the courts can consider any question settled, this is one. For nearly 90 years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settled the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be (Minor v. Happerset, 88 U.S. 162, 177 (1874)).

This was the consistent doctrine of the Supreme Court for generations. In United States v. Reece (92 U.S. 214 (1875)), election inspectors were indicted under sections of a postwar

Civil Rights Act for depriving a Negro citizen of the right to vote in a municipal election. The Court held that those sections of the statute were vague and indefinite, therefore unconstitutional, because they did not precisely limit the definition of the Federal crime to deprivation of voting rights protected by the 14th and 15th amendments.

The Court said (United States v. Reece, 92 U.S. 214, 217-218 (1875)):

> The 15th Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by "appropriate legislation."

Language in Ex parte Yarbrough (110 U.S. 651 (1884)) that the right to vote is a federally created right is not controlling because it is dicta. In the Yarbrough case, the indictments specifically alleged deprivations of voting rights on account of the race, color, and previous condition of servitude of the victim—matters clearly within the purview of the 15th Amendment.

From this it is clear that, except where the 14th and 15th Amendments provide otherwise, the right to vote is a State matter and is not a federally created right. To the extent that H. R. 627 seeks to exceed the purview of the 14th and 15th Amendments, it is clearly unconstitutional. This applies to the functions of the Commission on Civil Rights in investigating any and all allegations of deprivations of the right to vote and to the intrusion of the Federal Government into this area by the provisions of part IV of H. R. 627. And, furthermore, assuming, arguendo, that the Supreme Court would overturn recognized constitutional doctrine and uphold the expansion of Federal power provided by H. R. 627, this is no reason for Congress in the first instance to fly in the face of the traditional and historical American policy of leaving the control of elections to the States and to the people.

Part IV of H. R. 627 would authorize the Attorney General to bring a civil suit for damages or injunctive relief "whenever any person has engaged or is about to engage in any act or practice which would deprive any other person" of the right to vote. This vague language is similar to the provision in part III of H. R. 627 giving the Attorney General a civil action to implement the Criminal Conspiracy Statutes, section 1980 of the Revised Statutes. There is also a provision abolishing the requirement of exhausting State administrative remedies before resorting to the Federal courts. No reasonable basis can be found for bypassing existing State administrative remedies before proceeding to Federal courts. The doctrine of the exhaustion of administrative remedies is based on commonsense. It is nonsense to abolish it in these voting cases. As the Fifth Circuit Court of Appeals indicated in Peay v. Cox (190 F.2d 123 (1951)), parties should exhaust "simple, and cheap" State administrative remedies before seeking damages and injunctive relief in the Federal district court. In that case the court directed the parties to appeal to a board of election commissioners from the refusal of an election registrar to register them for voting. This is the commonsense handling of all disagreements with election registrars. If parties need not appeal to similar board of election commissioners before resorting to extraordinary remedies against the registrar, there is little, if any, good purpose served in providing administrative appeals from the action of election registrars.

[*Balance of Power*]

Not only is the doctrine of the exhaustion of administrative remedies based on commonsense but when the Federal-State relationship is involved, it preserves the balance of power between the two sovereigns. Federal authority should never be intruded into a State proceeding until the State remedies have been exhausted. If a subordinate State official has erred, his superior State authorities should have the opportunity to rectify the error before Federal officials are intruded into the preliminary stages of the proceeding.

The right to vote is indeed one of the most important rights that any American citizen can possess, and it should be protected by all manner and means which are consistent with the fundamental principles set forth in the Constitution. No one should be denied the exercise of that right by any means of a discriminatory nature. At the same time, however, the protection of that right, as well as its exercise, must be consistent with constitutional principles. Up to now the right to vote in accordance with the Constitution has been controlled by State statute. If additional powers in the field of elections and voting rights are deemed to be necessary to be vested in the Federal Government, then Congress should attack the problem squarely, by proposing an amendment to the Constitution. This was the suggestion made by President Eisenhower when he proposed that the voting age should be fixed at 18. This legislation seeks to accomplish indirectly what is forbidden directly by the Constitution.

Moreover, the broad general language which this legislation proposes opens up to Federal intervention the entire field of Federal elections, not only general elections for Federal office but also the primaries. There is also a very definite possiblity that this power may intrude itself into political party deliberations, particularly with reference to delegates to conventions involving Federal offices. The enactment of this legislation can only result in another intrusion by the Federal Government into a field which has been reserved to the States. The stability of State laws will be disrupted; the election procedures stymied.

In the light of the recent decision of the Supreme Court in the Nelson case one wonders whether or not in the near future the ruling will be made that the Federal Government has preempted the field of suffrage. Strong centralization of the Federal Government continues, and the traditional doctrine of States' rights is again delivered a fatal blow.

E. E. Willis.
James B. Frazier, Jr.
Robert T. Ashmore.
E. L. Forrester.
Woodrow W. Jones.
Wm. H. Tuck.
Richard H. Poff.

STATE AGENCIES

Consent to Suit—Louisiana

House Bill No. 434 of the 1956 session of the Louisiana Legislature proposes an amendment to the state constitution, to be voted on in November, 1956, withdrawing consent of the state to suit against certain state agencies, including agencies concerned with recreational and educational activities. That bill follows:

A JOINT RESOLUTION

Proposing an amendment to Article XIX of the Constitution of Louisiana by adding thereto a new Section 26, designating and defining certain agencies of the State of Louisiana and withdrawing consent of the State to suits against such agencies, providing exceptions to such withdrawal of consent and means for granting such consent in individual cases.

Be it Resolved by the Legislature of Louisiana, two-thirds of the Members elected to each House concurring:

Section 1. That there shall be submitted to the electors of the State of Louisiana, for their approval or rejection a proposition to amend Article XIX of the Constitution of Louisiana, by adding thereto a new section numbered 26, which shall read as follows:

Section 26. The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:

(1) The State Parks Commision of Louisiana,

(2) The Recreation and Park Commission for the whole Parish and East Baton Rouge,

(3) All recreation districts created under terms of Article XIV, Section 14 (d-4) of this Constitution;

(4) Any municipal corporation, parish or subdivision of the State in matters respecting the operation or maintenance of parks and other recreational facilities or in connection with any rule or regulation applicable thereto.

(5) The State Board of Education,

(6) The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College,

(7) The parish school boards of each of the parishes of the State of Louisiana, and

(8) The school boards of the municipalities of Monroe in Ouachita Parish and Lake Charles in Calcasieu Parish, and Bogalusa in Washington Parish,

(9) The state superintendent of Public Education in his capacity as such as well as in the capacity of ex-officio secretary of the State Board of Education, and,

(10) The State Department of Education.

The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, (however heretofore given) is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in this section. This withdrawal of consent to suits and legal proceeding shall apply not only to suits and legal proceedings filed in the future but also to any pending suits or legal procedure. There is expressly excepted from the foregoing, suits for the enforcement of contracts entered into by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35 of Article III of this Constitution.

This Section shall be self-operative and shall supersede any other portion of this Constitution or any statutes or regulations in conflict herewith.

Section 2. That said proposed amendment be submitted to said electors at the next general election to be held in Louisiana on the first Tuesday next following the first Monday in November, 1956.

Section 3. That on the official ballot to be used at said election there shall be printed:

FOR amending Article XIX, Constitution of Louisiana, by adding a new Section 26 designating special agencies of the State and withdrawing consent for suits against the same, providing exceptions thereto and granting the Legislature the right to permit such suits in individual cases.

AGAINST amending Article XIX, Constitution of Louisiana, by adding a new Section 26 designating special agencies of the State and withdrawing consent for suits against the same, providing exceptions hereto and granting the Legislature the right to permit such suits in individual cases.

and each elector voting on said propositions for so amending said Constitution shall indicate his vote relative thereto in the manner provided by the General Election Laws of the State of Louisiana.

PUBLICATIONS

Identification—North Carolina

Ordinance No. 310 of March 28, 1956, of the City of Charlotte, North Carolina, prohibits the anonymous printing or distribution of certain publications which would tend to expose any individual or racial or religious group to hatred, contempt or ridicule. That ordinance follows:

AN ORDINANCE prohibiting the printing, publishing, or distributing of anonymous handbills, dodgers, circulars, booklets, pamphlets, leaflets, cards, stickers, periodicals, literature or papers, which tend to expose any individual or any racial or religious group to hatred, contempt, ridicule or obloquy.

Be it ordained by the City Council of the City of Charlotte:

Section 1. That, Chapter 20 of the City Code of the City of Charlotte (O. B. 10) be amended by inserting after Section 8, a new section numbered 9, entitled, "Anonymous Handbills Prohibited", reading as follows:

(a) The word "person", when used in this ordinance, shall mean any person, individual, firm, partnership, corporation, organization, or any officer or agent thereof.

(b) It shall be unlawful for any person to print, publish, distribute, or cause to be printed, published or distributed, by any means, or in any manner whatsoever, any handbill, dodger, circular, booklet, pamphlet, leaflet, card, sticker, periodical, literature or paper which tends to expose any individual or any racial or religious group to hatred, contempt, ridicule or obloquy, unless the same has clearly printed or written thereon:

1. The true name and post office address of the person, individual, firm, partnership, corporation, or organization causing the same to be printed, published or distributed, and

2. If such name is that of a firm, corporation, or organization, the name and post office address of the individual acting in its behalf in causing such printing, publication, or distribution.

(c) This ordinance shall not be construed to relieve the author, distributor or person who causes to be printed, published or distributed any of the matter herein set forth, from any civil or criminal liability now or hereafter imposed by law or ordinace.

Section 2. Further amend said Chapter 20 of the of the City Code by re-numbering present Section 9, Section 10.

Section 3. This ordinance shall be in effect from and after its adoption.

ADMINISTRATIVE AGENCIES

EDUCATION

Public Schools—Kentucky

The Board of Education of Louisville, Kentucky, has announced a program for desegregation of the schools of that city, beginning in September, 1956. The plan announced by the Board follows:

1. The program shall go into operation in September, 1956.
2. The change shall be complete—throughout the Louisville School District and at all levels, kindergarten through high school and adult classes.
3. The entire area of the Louisville School District will be redistricted without regard to race.
4. In redistricting, there shall be no gerrymandering or other establishment of unnatural boundaries.
5. The redistricting shall be done in such manner as to serve all the children as con-

With the announcement of the plan, Louisville parents were furnished the following card to complete and sign:

Dear Parent:

On the reverse side of this card is the plan adopted by the Board of Education for ending compulsory racial segregation in the Louisville Public Schools. In the redistricting, your child

_____ _____

Pupil's Name (First) (Last) Address

_____ _____

(Present School) (Present Grade)

belongs in _____ school.

If you prefer another school, please list below your 1st, 2nd, and 3rd choice and return to the school your child is now attending on or before March 8, 1956. When there are more requests for transfers than can be granted, decisions will be made in accordance with items 9 and 10 of the plan.

First Choice_____ Second Choice_____ Third Choice_____

PARENT PLEASE SIGN AND RETURN _____

Signature of Parent or Guardian

veniently as possible, with proper regard to the capacities of buildings.

6. To each school shall be assigned an area which will furnish, without excessive travel, the approximate number of pupils, regardless of race, which it may reasonably serve.

7. If two or more schools are close together, or for other reasons it seems wise, a single district may be established for them and parents may be permitted to choose freely between or among them within the capacities of the respective schools.

8. When new district lines have been established and approved by the Board of Education, parents of all children will be informed in writing the school or schools in which their children belong.

9. A parent who prefers another school may request a transfer. The transfer and the parent's preference of schools will be granted within the capacities of the schools and with due regard for the convenience of the child and the preferences and convenience of other parents and children.

10. Transfers such as those described in paragraph 9 above shall not be permitted to crowd out of any school pupils who, by residence, belong in this school.

11. A pupil attending a school other than the one which serves the district in which he lives may be required to transfer to the school in which he belongs by residence if attendance, conduct or school work is not satisfactory.

12. Pupils attending a school outside the district of residence will not receive free transportation, except in unusual cases which the superintendent may approve.

EDUCATION

Public Schools—Virginia

At a public meeting in Prince Edward County, Virginia, on May 3, 1956, the Board of Supervisors of that county adopted certain resolutions with respect to the operation of the public schools of that county. At the same time an "affirmation" and "declaration of convictions" was adopted by the meeting of county citizens. (See also 1 Race Rel. L. Rep. 82) Those documents follow:

AFFIRMATION

We, the undersigned citizens of Prince Edward County, Va., hereby affirm our conviction that the separation of the races in the public schools of this county is absolutely necessary and do affirm that we prefer to abandon public schools and educate our children in some other way if that be necessary to preserve separation of the races in the schools of this county.

We pledge our support of the Board of Supervisors of Prince Edward County in their firm maintenance of this policy.

NOTE.—This affirmation has been signed by 4,216 citizens over 21 years of age in the county which is 1,000 more than the total qualified registered voters.

RESOLUTIONS

At a regular meeting of the Board of Supervisors of Prince Edward County held at the courthouse thereof, on the 3rd day of May 1956, at which meeting all members of the board were present, the following resolutions were adopted unanimously:

I

Be it resolved by the board of supervisors, That we do hereby express to the people of Prince Edward County our gratitude that they have made known to this board so clearly their views upon the grave problems with which we are confronted with respect to our schools. The support of our people makes the burden of our responsibilities lighter and the course of our future action clearer. We trust the people of the county will continue to make known to us their views as we go forward to meet our problems together.

II

Be it resolved, That the Board of Supervisors

of Prince Edward County as the elected representatives of the people of Prince Edward County, do hereby declare it to be the policy and intention of said board in accordance with the will of the people of said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

III

Be it resolved by the Board of Supervisors of Prince Edward County, That the Governor of Virginia, the superintendent of public instruction, and the State Board of Education are hereby requested to pay any State revenue to the School Board of Prince Edward County in support of public schools in accordance with the policy adopted by the board of supervisors of said county for the payment of local revenue to said school board.

IV

Be it further resolved by the Board of Supervisors of Prince Edward County, That the "Affirmation" signed by citizens and school patrons of the county is hereby received and directed to be filed with records of the board and it is further resolved that the "Statement of Convictions and Purposes" adopted by the citizens of this county present at this meeting (being approximately 250 in number) be received by the board and it is directed that the same be filed with the records of the board.

And the clerk of this board is directed to prepare copies of the affirmation with a statement attached thereto showing the number of the citizens whose names are signed thereto together with copies of the "Statement of Convictions and Purposes" and that one copy of each be transmitted to the School Board of Prince Edward County, the Governor of Virginia, the superintendent of public instruction, the attorney general of Virginia, the State Board of Education, Representative J. H. Daniel and Senator J. D. Hagood, together with a copy of this resolution, and of the resolution this day adopted stating the policy and intention of this board with respect to the levy of taxes and appropriation of local revenue for school purposes.

V

Be it resolved by the Board of Supervisors of Prince Edward County, That the Governor be and he is hereby respectfully requested not to call a special session of the Legislature of Virginia for the purpose of presenting any legislative plan which would require, permit, or authorize under the laws of Virginia the teaching of white and Negro children together in the public schools of Prince Edward County.

HORACE ADAMS,
Clerk of the Board.

DECLARATION OF CONVICTIONS

(Adopted May 3, 1956, by citizens of Prince Edward County, Va.)

The power of the Federal courts being once again invoked against the administrative officers of our public schools for the purpose of causing children of the white and Negro race to be taught together therein, we the people of Prince Edward County, Va., deem it appropriate that we should make known to all men our convictions and our purposes.

We first affirm our deep and abiding loyalty and devotion to our country and its institutions. We acknowledge the Constitution to be the supreme law of the land and the bulwark of our liberties, ever subject to the sovereign powers reserved by it to the States and to the people. We know that the liberties of all Americans of all races rests upon the Constitution and the division of powers ordained therein. We deem it the obligation of free men to preserve the powers reserved under the Constitution to the States and to the people and to preserve the constitutional separation of the powers of government in the legislative, executive, and judicial branches separately.

We believe that the educational, social, and cultural welfare and growth of both the white and Negro races is best served by separation of the races in the public schools.

We believe the tranquility, harmony, progress, and advancement of the Negro and the white races, who must live together in Virginia and in Prince Edward County, is absolutely dependent upon the mutual good will and mutual respect of each race for the other.

We believe that a policy which undertakes to force the association of one race with the

other against the will of either, by court decree under threat of fine or imprisonment, is destructive of mutual good will and respect, breeds resentment and animosities, and is injurious to the true interests of both races.

Education Parents' Duty

We believe that the molding of the minds and characters of our children is the sacred duty and the priceless natural right and obligation of parents.

Freedom of decision with respect to these considerations touching as they do the most intimate relations of the people of our community and the most cherished natural rights and duties of parenthood is absolutely essential to the maintenance, operation, management, and control of our public schools. We conceive this freedom to be among the sacred rights "retained by the people" under the ninth amendment of the Federal Constitution.

Among the reserved rights and powers of the States guaranteed to the State of Virginia under the 10th Amendment, is the power to maintain racially separate public schools. We do not perceive that the exercise of this power has ever been prohibited to the States by any provision of the Federal Constitution. We believe that this power can be prohibited to the States only by the States themselves. To concede the right of a Federal court to withdraw this power from the individual States is to concede that all rights and powers of the States and of the people are enjoyed at the sufferance of the judiciary and that the guaranties of the liberties of the people are no longer fixed in the Constitution itself.

We do not intend to speak disrespectfully. The gravity of the issues requires that we speak plainly. By its decision of May 17, 1954, and subsequent decisions the Supreme Court of the United States has flagrantly exceeded its lawful and intended authority, trespassed upon the rights of the people and dangerously encroached upon the reserved rights of the States.

Holding these convictions, it is not possible for us to submit the children of Prince Edward County to conditions which we most deeply and conscientiously believe to be pernicious. Nor can we as the heirs of liberty, purchased at so great a sacrifice by those who have gone before, submit to this judicial breaking of the constitutional chains forged to restrain tyranny for all generations of Americans. We, therefore, pledge ourselves firmly to use every honorable, legal and constitutional means at our command to oppose this assault upon the Constitution and upon the liberties of our people.

Prohibit Funds

Therefore, if courts refuse to recognize these most fundamental, intimate, and sacred rights and the profound necessity that they be respected, then we proclaim our resort to that first American tenet of liberty—that men should not be taxed against their will and without their consent for a purpose to which they are deeply and conscientiously opposed. We ask our board of supervisors as our legislative representatives to proceed at the appropriate time to enact and adopt whatever ordinances and resolutions may be required to prohibit the levying of any tax or the appropriation of any funds for the operation of racially mixed schools within Prince Edward County to the end that all public schools of the county may be closed upon the entry of a court order requiring the mixing of the races in any school of this county.

We further call upon our school board to make known to the district court the determination of the people of Prince Edward County here expressed. The issues are too profound and the consequences to our people too grave to leave any doubt of the impossibility of our compliance or of the resolute mind of our people. An order to mix the races in our schools can only result in the destruction of the opportunity for a public education for all children of this county.

Month-to-Month Basis

We also call upon the Governor of Virginia and all officials of the Commonwealth in control thereof to pay State revenue to Prince Edward County for school purposes in accordance with the policy adopted by the board of supervisors for the payment of local funds for school purposes, thus and thereby giving effect to the interposition resolution of the General Assembly of Virginia, adopted on February 1, 1956, fixing the policy of this Commonwealth, "to take all appropriate measures, honorably, legally, and constitutionally available to us, to resist this illegal encroachment upon our sovereign power."

It is with the most profound regret that we have been forced to set this course. The history of the people of Prince Edward County demonstrates their love and appreciation of the value of educational opportunity. We act with no animus toward any man or body of men. We do not act in oppression of the Negro people of this county. We propose, in every way that we can, to preserve every proper constitutional right of all the people of Prince Edward County. However deeply convinced as we are of the wrongness and imprudence of intimate racial integration, we cannot and will not place merely supposed rights, newly created by judicial mandate, above the conscience of our people and above rights and powers, which for generations have been exercised honorably and constitutionally by the people of our county.

It is our earnest hope that other counties and the Commonwealth of Virginia will repudiate the spurious allurements of expediency and stratagem in order that Virginia may stand as she has always stood, dedicated to the protection of the rights of a free people against tyranny from any quarter. If we fail in this solemn obligation now our rights will be extinguished one by one.

TRANSPORTATION

Airports—Federal Regulations

On April 6, 1956, the Administrator of Civil Aeronautics issued Airports Policy and Procedure Memorandum No. 41 which explains the application of the policy adopted by the Administrator to withhold Federal-aid Airport Program funds from developments where racially separate facilities are to be constructed or used. That Memorandum follows:

April 6, 1956
Airports Policy and Procedure
Memorandum No. 41

TO: All Holders of the Office of Airports Field Operations Manual

FROM: Administrator of Civil Aeronautics

SUBJECT: Airport Building Policy—Segregation

Programming Standard G(3), as stated in the "Policies and Procedures" booklet, dated October 1, 1955, reads as follows:

> "(3) No Federal-aid Airport Program funds will be made available for the development of separate facilities or space in an airport building when such facilities or space are designed for use now or in the future for separate racial groups."

The purpose and intent of the policy expressed in this Programming Standard is to prevent the use of Federal funds to further or to increase racial segregation in airport buildings. Under this policy, Federal-aid Airport Program funds will not be used in the construction or reconstruction of any areas of a building which are intended for use by separate racial groups.

It will, therefore, be required, prior to the issuance of a grant offer for any project involving a building, that the chief executive officer of the sponsor of each building project clearly state, in writing, whether or not it is the intent of the sponsor that all of the areas and facilities in the building will be available without regard to race, creed or color, and are intended to be operated on a non-segregated basis.

If not, it will be necessary that the written statement describe those areas and facilities within the building which are intended for segregated use.

If so, a simple written statement to this effect will suffice, unless the building will, upon completion, contain separate facilities, such as two or more waiting rooms, two or more dining areas, or two or more sets of sanitary facilities (a set consisting of one rest room for men and one rest room for women), etc. In this event, the sponsor's written statement shall, in addition, specifically point out the reason for providing such duplicate facilities and the intent of the sponsor in providing them.

If the written statement of the sponsor describes areas within the building that are intended for segregated use, such areas will not be eligible for, and will be excluded from, Federal-aid Airport Program participation. This will be accomplished by a special provision in the grant offer clearly specifying the ineligible space.

Where single facilities (one waiting room, one dining area or one set of sanitary facilities) are provided, from which it is intended that any person will be excluded on the basis of race, creed or color, such segregated areas will be excluded from the project.

Where duplicate facilities are provided, intended for segregated use, the areas involved in such duplicate facilities will be excluded from the project. For example:

(a) If separate waiting rooms for segregated use are provided, all waiting room areas will be excluded.

(b) If separate dining areas are provided for segregated use, all dining, kitchen and related areas will be excluded.

(c) If separate sanitary facilities are provided for segregated use, all areas involving sanitary facilities will be excluded.

This policy will apply to all types of building construction work, including the construction of new buildings, the construction of additions to existing buildings, and the remodeling, alteration or repair of existing buildings, and will apply whether the work consists of the completion of a facility or its partial completion, such as the roughing-in of utilities.

The allowable costs of a building project, which include space and/or facilities excluded from Federal participation in the grant agreement, will be determined on the basis of an equitable distribution of the costs of the eligible and ineligible space and/or facilities. This, of course, should be taken into consideration in computing the maximum obligation of the government as stated in the grant offer.

Any unusual cases which are not clearly covered by this policy will be presented to the Administrator for final determination.

C. J. Lowen

EMPLOYMENT

Equality of Opportunity—Federal Regulations

Executive Order 10590, January 18, 1955, established the President's Committee on Government Employment Policy in order to provide equal opportunity to all persons, regardless of race, color, religion or national origin, for employment with the federal government. The Committee appointed pursuant thereto has adopted regulations and procedures for its operation. That Executive Order and the Regulations and Procedures adopted follows:

EXECUTIVE ORDER ESTABLISHING THE PRESIDENT'S COMMITTEE ON GOVERNMENT EMPLOYMENT POLICY

WHEREAS, it is the policy of the United States Government that equal opportunity be afforded all qualified persons, consistent with law, for employment in the Federal Government; and

WHEREAS, this policy necessarily excludes and prohibits discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin; and

WHEREAS, it is essential to the effective application of this policy in all civilian personnel matters that all departments and agencies of the executive branch of the Government adhere to this policy in a fair, objective, and uniform manner:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and consistent with the provisions of section 214 of the act of May 3, 1945, 59 Stat. 134 (31 U.S.C. 691), it is hereby ordered as follows:

Section 1. There is hereby established the President's Committee on Government Employment Policy (hereinafter referred to as the Committee). The Committee shall be composed of five members, as follows: (a) One representative of the Civil Service Commission, to be designated by the Chairman thereof, (b) one representative of the Department of Labor to be designated by the Secretary of Labor, (c) one representative of the Office of Defense Mobilization, to be designated by the Director thereof, and (d) two public members to be appointed by the President. Not more than two alternate public members may be appointed by the President as he may deem necessary. Three members of the Committee shall constitute a quorum, provided that at least one public member or alternate public member is present. The President shall designate the Chairman and the Vice-Chairman of the Committee, and each member or the Committee shall serve at the pleasure of the President.

Section 2. The Committee shall:

(a) Advise the President periodically as to whether the civilian employment practices in the Federal Government are in conformity with the non-discriminatory employment policy recited in the preamble of this order, and, whenever deemed necessary or desirable, recommend methods of assuring uniformity in such practices;

(b) At the request of the head of a department or agency, or the Employment Policy Officer thereof, consult with and advise them concerning non-discriminatory employment policies under this order and regulations of such department or agency relating to such policies;

(c) Consult with and advise the Civil Service Commission with respect to civil-service regulations relating to non-discriminatory practices under this order;

(d) Review cases referred to it under the provision of this order and render advisory opinions on the disposition of such cases to the heads of the departments or agencies concerned;

(e) Make such inquiries and investigations as may be necessary to carry out its responsibilities under this section.

Section 3. The head of each executive department and agency shall be responsible for the effectuation of the policy of this order with respect to all civilian personnel matters under his authority and shall:

(a) Prescribe regulations for the administration of the employment policies under this order that will insure a complainant of an appeal to the proper authorities within his department or agency, a fair hearing, and a just disposition of his case. The regulations shall in all cases provide that subsequent to the recommendations of the Employment Policy Officer, as provided in section 6 (b) of this order, and prior to the final decision of the department or agency, and upon the written request of the complainant, the complainant's case shall be referred to the Committtee for its review and an advisory opinion as provided under section 2 (d) of this order.

(b) File with the Committee a copy of the regulations prescribed for his agency pursuant to subsection (a) of this section, and report to the Committee all instances in which complaints are made regarding the actions of the department under the policy of this order, together with a statement of the disposition made of the complaint.

Section 4. The head of each executive department and agency, or his designated representative, may refer any case coming within the purview of this order to the Committee for review and an advisory opinion whenever he deems necessary.

Section 5. The head of each executive department and agency shall designate an official of his department or agency as Employment Policy Officer, and shall designate such Deputy Employment Policy Officers as may be necessary to assist the Employment Policy Officer to effectively carry out the policy of this order. The position of Employment Policy Officer shall be established outside of the division handling the personnel matters of the department or agency concerned. Each Employment Policy Officer

shall be under the immediate supervision of the head of his department or agency, and shall be given the authority necessary to enable him to carry out his responsibilities under this order. All officials and employees of each department and agency shall be advised of the name of its Employment Policy Officer.

Section 6. Each Employment Policy Officer shall:

(a) Advise the head of his department or agency with respect to the preparation of regulations, reports, and other matters pertaining to the policy of this order and the conformity therewith of the conduct of personnel matters in his department or agency;

(b) Receive and investigate complaints of alleged discrimination in personnel matters within his department or agency and make recommendations to appropriate administrative officials for such corrective measures as he may deem necessary;

(c) Appraise the personnel operations of the department or agency at regular intervals to assure their continuing conformity to the policy expressed in this order.

Section 7. The Civil Service Commission shall in connection with its responsibilities under the law issue such regulations as may be necessary to implement the policy of this order.

Section 8. This order supersedes Executive Order No. 9980 of July 26, 1948, and the Fair Employment Board established thereby in the Civil Service Commission is abolished. The records and property of the Fair Employment Board shall remain with the Civil Service Commission and shall be available for the use of the Committee.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
January 18, 1955

REGULATIONS AND PROCEDURES OF THE PRESIDENT'S COMMITTEE ON GOVERNMENT EMPLOYMENT POLICY

The President's Committee on Government Employment Policy, hereinafter referred to as *"The Committee,"* adopts the following regulations and procedures pursuant to the provisions of Executive Order 10590.

I. Coverage of Executive Order 10590—

A. The policies and procedures under Executive Order 10590 are limited to those employment practices in the Federal Service improperly based on consideration of race, color, religion or national origin.

B. Segregation of employees on the basis of race, color, religion or national origin comes within the scope of Executive Order 10590.

C. The Order applies to all departments and agencies in the Executive Branch of the Federal Government wherever located and to all positions in the departments and agencies whether or not in the competitive service.

D. The remedies provided by the Executive Order shall be limited to citizens of and persons who owe allegiance to the United States and who are employees of, or are applicants for employment with, a department or agency in the Executive Branch of the Federal Government.

II. Authority and Responsibility of the Committee—

In the execution of its authority and the performance of its responsibilities, under Executive Order 10590, the Committee shall—

A. Adopt and promulgate such rules and regulations and utilize such procedures, methods and techniques as it finds necessary or desirable to accomplish its functions.

B. Draft procedures and standards for the

use of departments and agencies in the appraisal of personnel operations, in the handling of complaints and in the preparation of reports.

C. Receive and review complaints of discrimination based on race, color, religion or national origin referred to it either on the initiative of the complainant or the initiative of the head of a department or agency, or his designated representative, and render advisory opinions to the head of a department or agency, or his representative, on the disposition of such cases.

D. Consult with and advise the heads of departments and agencies and their Employment Policy Officers concerning methods, techniques, policies, procedures and regulations for making effective the non-discriminatory employment policy of the Federal Government.

E. Continuously review and appraise the methods, policies, procedures and regulations dealing with personnel programs and personnel actions—including recruitment, examination, certification, appointment, assignment, training and promotion—to assure that all employees and applicants for employment are afforded equal employment opportunities in the Federal Service. When such methods, policies, procedures or regulations permit or facilitate a discriminatory employment practice the Committee will consult and advise the Civil Service Commission and other agencies and departments concerning the adoption of corrective measures.

F. Make such inquiries and investigations as may be necessary to carry out its responsibilities.

G. Report to the President from time to time on progress achieved in making the non-discriminatory policy more effective and submit when necessary appropriate recommendations.

H. Disseminate information pertinent to the subject of discrimination in employment.

I. Secure from departments and agencies such information as may be needed for the review of employment practices or for the compilation of reports.

III. Membership of the Committee—

The Committee shall be composed of five members and two alternate members appointed in accordance with Section 1 of Executive Order 10590. Three members, one of whom shall be a public or alternate public member, shall constitute a quorum, except (1) when decisions on fundamental questions of policy are involved or (2) when there is a dissenting opinion. When either or both of these conditions are present final action shall be taken by not less than four regular members or five of the seven.

IV. Officers of the Committee—

A. The officers of the Committee shall consist of the Chairman and Vice-Chairman, appointed by the President.

B. The Chairman shall perform all of the usual duties appertaining to that office, including negotiations with heads of departments and agencies, presiding at Committee meetings, the preparation of an agenda, the designation of hearing officers or committees, the representation of the Committee during the interim between meetings, the calling of the meetings, the exercise of general supervision over the administrative work of the Committee, and the performance of such other duties as may be necessary to the proper functioning of the Committee. The Vice-Chairman shall act in the absence of the Chairman or in the case of his inability to act. In the absence of

both, members present shall choose a temporary chairman.

C. The Committee shall select an Executive Director who shall, under the general direction of the Chairman, be responsible for the general administrative work of the Committee and be responsible for the direction of the staff. He will advise and assist the Committee members as they may require and will attend all Committee meetings and will be responsible for the preparation of the minutes of such meetings.

V. MEETINGS OF THE COMMITTEE—

The Committee shall meet from time to time as may be required. Special meetings may be called by the Chairman, or on the request of three or more members.

VI. PUBLICITY—

The Chairman, or someone designated by him, shall be the sole spokesman for the Committee in interviews with the press concerning official actions or decisions of the Committee and shall be responsible for issuance of press releases.

VII. REVIEW OF CASES BY THE COMMITTEE—

A. The Committee shall accept for review any case coming within the purview of Executive Order 10590, if such case has been referred to it either by the head of the department or agency, or his representative, or if referred on specific request of the complainant provided that—

(1) The complaint was originally filed in accordance with established procedure and the complainant has acted diligently in the prosecution of his complaint and has cooperated with the department or agency in furnishing information.

(2) The issues presented have been thoroughly investigated and a hearing held thereon, if one has been requested by the complainant.

(3) An analysis and appraisal has been made when required by Section IX of these Regulations.

(4) Findings of fact and a recommended course of action on the resolution of the complaint have been made by the Employment Policy Officer.

B. In its review of a case, the Committee may, when additional information is needed and when conditions warrant, request the complainant to make an appearance in person, by a representative, or accompanied by a representative. If such appearance is made the proceedings before the Committee will be conducted informally and appearances shall be limited to the complainant, his representative, and representatives of the department or agency. Testimony will be given under oath or affirmation and normally verbatim transcripts of such testimony will not be made. In unusual circumstances the Chairman may designate a Hearing Officer or Hearing Committee to take testimony, in which case a verbatim transcript of such testimony shall be made for consideration by the Committee.

C. If the evidence in a case is inconclusive, the Committee may request the head of the department or agency, or his Employment Policy Officer, to furnish additional information, or the Committee may, on its own initiative, secure the required information by such investigation and inquiry as it finds necessary in order to resolve the issues in the case.

D. On all the evidence introduced into the record of the case, the Committee shall draft findings of fact and when indicated recommend to the head of the department or agency, or his representative, appropriate corrective action. The findings and recommendations, when made, shall be transmitted to the head of the department or his representative by the Executive Director simultaneously with the return of the department or agency file in the case. The final decision on the case shall be furnished the complainant by the head of the department or agency or his representative.

E. The Committee will review under this Section those cases which were pending with the Fair Employment Board of the U. S. Civil Service Commission on January 18, 1955. Cases which were pending in the departments and agencies on that date shall be processed in accordance with the procedure established by Executive Order 10590 and these regulations. The Committee may review any case closed out within a department or agency in the interval from January 19, 1955, and the effective date of these regulations if the complainant was not advised that he could request that his case be referred to the Committee for review.

VIII. Initiation of Complaint Under Executive Order 10590—

A. An employee, an applicant, a duly authorized representative, or the designated spokesman of a duly constituted group or organization, may file a written complaint under the provisions of Executive Order 10590. The complaint must be filed within 45 days of the specific personnel action complained of, except that a complaint involving a discharge action must be made within ten days of the effective date of such action, unless the complainant is prevented from filing within these time limits by circumstances beyond his control. A complaint will not be subject to these specific time limits if it is concerned with a continuing discriminatory practice.

B. All complaints may be filed with the Employment Policy Officer or the Deputy Employment Policy Officer or the Committee.
Those filed with the Committee will be referred to the appropriate Employment Policy Office for consideration.

C. Each complaint must—

(1) Specify whether the alleged discrimination is based on race, color, religion or national origin.

(2) Disclose the specific action or personnel matter about which complaint is made.

(3) Identify the position involved, its grade, and the unit or office in which located.

(4) Identify the official responsible for the action, if known.

(5) Give the date of the action.

(6) Contain all factual information which the complainant may have to support the allegation of discrimination.

In addition to the foregoing, a complaint involving a disciplinary action must set forth sufficient facts or circumstances to form a substantial basis to support the specific allegations of discrimination as opposed to the complainant's denial of a "letter of charges" on which the disciplinary action was based.

IX. Action on the Complaint in the Agency—

A. If the complainant has furnished the information indicated in the foregoing section, an investigation of the issues presented in the complaint shall be

undertaken immediately either by the Employment Policy Officer, or his deputy, or someone designated by them. If the complaint involves a failure of appointment or promotion, this investigation shall include, in all cases, an appraisal of employment practices in the organizational segment or unit in which the alleged discrimination occurred provided such appraisal has not been made within the preceding year.

B. Except in cases involving disciplinary actions, the burden of developing sufficient facts to resolve the issues in a case rests on the department and agency and not on the complainant.

C. A summary of the pertinent facts disclosed by the investigation and the appraisal shall be furnished the complainant. On request of the complainant, the full report of investigation and appraisal shall be made available for review.

D. After completion of the investigation and the appraisal an attempt shall be made by the Employment Policy Officer, his deputy, or someone designated by them to settle the complaint by informal negotiation with the complainant and appropriate administrative officials. The summary report of investigation and appraisal will form the basis for the informal negotiations.

E. If the complaint cannot be satisfactorily adjusted, the complainant shall be given an opportunity for a hearing on the case at a convenient time and place before the Employment Policy Officer, his deputy, or someone designated by them. If a hearing is held a transcript of testimony should be made, if practicable, otherwise a full summary shall be made and agreed to by the interested parties.

F. Following the investigation and hearing, if held, findings of fact and a recommendation of proposed resolution of the case shall be made by the Employment Policy Officer and presented to the complainant, at which time he shall be advised that he may have his case referred to the President's Committee on Government Employment Policy. If the complainant does not request referral of the case to the Committee final decision thereon shall be made and furnished to him.

G. Upon receipt of a request from the complainant for referral of his case to the Committee, the Employment Policy Officer shall transmit the complete file on the case to the Committee within five days.

H. In those cases which are referred to the Committee for review, final decision thereon shall be made by the head of the department or agency, or someone designated by him, after receipt of an advisory opinion from the Committee.

X. Delay in Handling Complaints—

A. All complaints filed under the provisions of Executive Order 10590 shall be handled expeditiously, fairly, and completely. In any case in which final settlement of a complaint is not made within ninety days from date of filing, a report setting forth a brief summary of the case and the reasons for the delay shall be forwarded to the Committee. In the event a department or agency unreasonably delays the final settlement of a complaint, the Committee may take jurisdiction of the complaint and render an advisory opinion thereon to the head of the department or agency.

B. Any unjustified delay or dilatory tactics by the complainant shall form the basis for dismissal of the complaint.

XI. Report of Disposition of Complaints—

The Employment Policy Officer shall submit to the Committee a summary

report concerning the final disposition of each written complaint filed under the Executive Order. Each report shall cover the following items:

(1) Name and address of the agency and the complainant.
(2) Date of complaint and with whom filed.
(3) Brief summary of complaint indicating the specific personnel action and specific race, color, religion or country or origin.
(4) Summary of the results of appraisal of employment practices and the significant facts disclosed by investigation and hearing.
(5) Statement of disposition of complaint. If withdrawn, furnish reason for withdrawal.
(6) Date of disposition of complaint.
(7) Signature and title of reporting official.

XII. Dissemination of Information—

A. The regulations and procedures of each department and agency for handling complaints of discrimination based on race, color, religion or national origin shall be drafted in conformity with the provisions of Executive Order 10590 and these regulations and shall be brought to the attention of all officers and employees of the department or agency.

B. A copy of the regulations and procedures of the department or agency, or a summary thereof, shall be posted on all employee bulletin boards and a copy of the regulations and procedures of the Committee shall be posted on all other bulletin boards which are used to announce Federal examinations and job opportunities in each department and agency.

C. A copy of the regulations and procedures of each department and agency, and any amendments thereto, shall be furnished to the Committee together with a report indicating that the provisions of the two preceding sections have been complied with.

D. Information concerning the department or agency non-discrimination policy and procedures shall be published at least annually in employee bulletins or newsletters, if any.

XIII. Employment Policy Officer and Deputies—

A. The head of each department and agency shall designate an Employment Policy Officer to perform the functions indicated in Section 6 of Executive Order 10590. A Deputy Employment Policy Officer shall be designated where necessary for all field offices and major sub-divisions of the department or agency. The restriction that the Employment Policy Officer shall not be connected with the division handling personnel matters shall apply also to the designation of such deputies.

B. All officers and employees shall be advised of the name and address of the official who has been designated to serve as Employment Policy Officer. The name and address of the Deputy Employment Policy Officer shall be made known to all officials and employees to be served by that Deputy.

C. The name of the Employment Policy Officer, his official title, his address and his telephone number shall be furnished to the Committee. Any change in the designation of the Employment Policy Officer shall also be furnished to the Committee as soon as such change occurs.

EMPLOYMENT

Fair Employment Laws—Pennsylvania

In January, 1954, the city of Erie, Pennsylvania, enacted City Ordinance No. 14-1954, which established a Community Relations Commission and prohibited discrimination on the basis of race, color, religion or national origin in employment practices. On March 21, 1956, that Commission issued its second annual report to the Mayor for the year 1955. A portion of that report follows:

INTRODUCTION

The Erie Community Relations Commission, established by the City Ordinance No. 14-1954, in January 1954, presents a report of its activities for the period from January 1 to December 31, 1955. It is the Commission's responsibility to administer the Erie Fair Employment Practice Ordinance and to support the purposes of this Ordinance by formulating and effectuating an educational program designed to prevent and eliminate prejudice and discrimination based on race, color, religion, national origin or ancestry.

The City of Erie, together with fifteen states and thirty-six cities in the United States, has established an official government agency whose stated purpose it is to work toward the elimination of discrimination due to race, color, religion, national origin or ancestry which discrimination not only denies equal opportunity to individual citizens by reason of group membership, but is detrimental to the health, welfare and safety of all Erie's citizens.

The Commission which represents the citizens of Erie consists of seven members from various religious, industrial, labor and community organizations:

Mr. J. LeGrand Skinner, Chairman
Rabbi Randall M. Falk, Vice-Chairman
Rev. Roger H. Sharpe, Secretary
Rev. Vincent L. Enright
Mrs. Neil H. Gebhardt
Mr. George E. Klemm
Mr. Archie W. Perry

This Second Annual Report is a partial record of the progress which the City of Erie has made in its efforts to promote equal treatment and equal opportunity for all its citizens.

Unfortunately, this report cannot give adequate recognition to those individual citizens, and citizen organizations, that have voluntarily initiated policies and practices which recognize the dignity of the individual and his right to equal opportunity. The Commission is aware that certain local employers have voluntarily established the practice of employment on merit, and that there are religious, educational, civic, recreational and social agencies in Erie that offer services and opportunity to all citizens equally. From the outset, the Commission has recognized that the job of establishing constructive community relations rests not with the Commission, but with every responsible citizen. The Commission can serve the community by receiving and working toward the adjustment of individual grievances, by providing information, educational materials, and consultation services which will enable citizens to understand the problem of discrimination and the effects it produces in a community; by assisting citizens and citizen groups that are interested in achieving constructive solutions to the various problems of discrimination.

The following pages of the Second Annual Report present the record of the Commission's experience as it received and adjusted grievances, offered consultation services, and provided informational materials to Erie's citizens during 1955.

I REGULATORY ACTIVITIES

"The Commission is authorized . . . . to receive and investigate and seek to adjust all complaints of discriminatory employment practices forbidden by this Ordinance. . . ."

Complaints of employment discrimination may originate with an aggrieved person, with an organization which has as one of its purposes the combating of discrimination, or upon the initiative of the Commission. During the year the Commission processed eleven complaints of employment discrimination. Table I below indicates the source of the complaints processed by the Commission during the year and the

cumulative total of complaints since February, 1954.

TABLE I
Complaints received

	Cumulative Total	
	1-5-55 to 12-31-55	1-26-54 to 12-31-55
From aggrieved person	9	15
From organizations	1	1
Initiated by Commission	1	1
Total Complaints	11	17

When a complaint of employment discrimination is made, the Commission must review the circumstances of the situation with the complainant and if necessary, conduct a preliminary conference with the respondent (the person or firm accused) in order to determine whether "probable cause" exists to support the allegations of the complainant.

Upon completion of the preliminary investigation of the circumstances of the complaint, it is accepted or rejected as a "case." Table II below indicates the disposition of complaints received during the year as well as the cumulative total of complaints and their disposition to date.

TABLE II
Disposition of Complaints

	Cumulative Total	
	1-1-55 to 12-31-55	1-26-54 to 12-31-55
1. Complaints unjustified and no unlawful practice found:	2	2
2. Probable cause found.		
(a) adjusted	5	5
(b) under conciliation	1	6
3. No probable cause found in complaint, but other unlawful practices found:		
(a) adjusted		
(b) under concilation	1	1
4. Complaint under investigation	1	1
5. Complaint referred to another agency	1	1
6. No action by complainants		1
Totals	11	17

During 1955, the Commission established findings and processed 8 "cases" of employment discrimination. Of these cases, 5 were satisfactorily adjusted, one is in conciliation, and one complaint was under investigation at the end of the year. One complaint was referred to another government agency since the Commission had no jurisdiction to process the complaint.

In some instances of verified complaints where "probable cause" was found, cases were closed in a few days, in others, the conciliation process was carried on for a number of weeks or longer. One case initiated early this year is still under conciliation. In all of the cases reviewed by the Commission this year the respondents were employers or their representatives, and the verified complaints were based on race or color.

The experience of the Commission to date in seeking to adjust verified complaints, emphasizes the success of the conference and conciliation process. In no instance did any respondent refuse to cooperate with the Commission in working toward the solution of a legitimate complaint. No case was brought to public hearing and there was no referral of a case for court action.

The following illustrative case histories are presented without identifying persons or organizations involved in order to provide an understanding of how the Commission functions when complaints are received:

1. "It shall be a discriminatory employment practice . . . for any employer because of the race, color, religion, national origin or ancestry of any individual *to refuse to hire. . . .*"

REFUSAL TO HIRE

The complainant, a Negro woman, requested an employment interview by telephone in response to an ad for clerical help appearing in a local paper. During the telephone conversation, after the complainant had stated her qualifications she told the company representative that she was a Negro. The company representative stated that she could not hire her because it was against company policy to hire Negroes. The following day the complainant came to the Commission and filed a complaint alleging that

she was denied consideration because of her race.

After the Commission checked the newspaper ad which stated certain limited qualifications and the complainant was interviewed to determine her training and work experience, notice of the complaint was sent to the respondent and a conference was requested.

Within two days a meeting was arranged by the regional director of the firm involved. During the meeting, the firm's regional director established that employees were selected on the basis of individual merit without regard to race, color, religion, national origin or ancestry, and that the statement of the firm's local representative to the complainant was contrary to company policy. The importance of establishing company policy with all supervisory personnel was discussed with the regional director.

The following day the complainant was interviewed offered the job and started to work. A followup with the employer and the complainant indicated that the situation was satisfactorily adjusted.

This case is cited to emphasize that it is not enough that an employer be aware of the provisions of the FEP Ordinance, but that all supervisory personnel should understand and apply company policy.

2. "It shall be a discriminatory employment practice . . for any employer because of the race, color, religion, national origin or ancestry of any individual . . . . to discriminate against him with respect to . . . *Conditions or privileges of employment. . .*"

Conditions or Privileges of Employment

The complainant, a young Negro man, applied "at the gate" of a local industrial firm for any kind of work. When he had completed an application form he was told that no openings were available and that he would be notified if any openings occurred. The complainant noticed, however, that two white applicants were hired. That same day in conversation with an acquaintance who was employed by the firm, the complainant learned that the two white applicants were hired as laborers. He came to the Commission, reported his experience, and filed a complaint.

A conference was arranged with the personnel director of the firm. The director informed Commission representatives that it was not the policy of the firm to discriminate, and that Negroes, as well as persons from various nationality groups had been employed by the firm for a number of years. With regard to the specific allegations of the complaint, the director maintained that the complainant was not hired because, in the opinion of the director, he was not strong enough to do the heavy work in job openings that were available. The Commission representatives were notified that the complainant would be hired for the first job opening in which he qualified.

A second conference was requested with the personnel director, since the Commission has the responsibility not only to adjust verified complaints, but also to review the total employment policy of the respondent. In this instance, company procedures indicated that although the firm was not directly discriminatory in its hiring practices, that it might be segregating within the work force.

This matter was discussed at a second conference when a review of placement and transfer procedures revealed that Negro employees were limited to certain departments in the plant. Under such a practice an employer is liable under the FEP Ordinance to a charge of discrimination in the conditions or privileges of work.

Although the personnel director was concerned about the possible reaction of white employees, he agreed to eliminate the discriminatory placement practices, and to notify the Commission if any problems arose. Representatives of the local union in the plant participated in later conference sessions and when the law was interpreted to them, they agreed to cooperate with the company in supporting fair employment practices.

Within a few weeks the original complainant was hired as a laborer and about three months after the original complaint was initiated the personnel director of the firm involved notified the Commission that a Negro employee with a good work record had been transferred to begin training in a department in which Negroes had not worked previously and that no difficulties had been experienced.

This case indicates that this employer and his supervisory personnel, although they were aware of the FEP law, did not apply the prin-

ciple of employment on merit in the placement and advancement of employees. The employer is liable not only when he discriminates at the "hiring gate" or through an employment agency, but also in the employment situation *when non-occupational factors are considered* in upgrading, transfer, conditions of work, rate of pay, tenure, etc.

The principle of fair employment works effectively when:

1. A firm and clear policy statement is established by the employer.
2. When this policy is understood and applied by supervisory personnel.
3. When this policy is supported by the labor union.
4. When this policy is clear to all employees.

In both cases cited above the complaints occurred because the employer involved, although claiming a non-discriminatory policy, had not clearly implemented the policy of employment on merit to supervisory personnel and other employees.

The initiative for establishing fair employment practices rests with the employer. Few, if any, problems have been experienced by employers, according to all available information from states and cities which have FEP laws, when the employer thoroughly understands and accepts the principle of employment on merit and interprets this principle throughout his organization.

When such acceptance and interpretation is lacking, the employer, who is responsible for the actions of his employees, unless they refuse to cooperate with company policy, is liable under the FEP law.

Unless clear interpretation and implementation of company policy is established the employer may be involved in unnecessary charges of discrimination because the receptionist, the interviewer, the personnel manager, the foreman, the labor union in the plant, or the employment agency do not know that it is the policy of the firm to hire qualified workers regardless of race, color, religion, national origin or ancestry.

The Commission is willing to provide whatever consultation services may be necessary to assist the employer, or others in the employment situation, to understand and implement such a policy of employment on merit.

II INFORMATION AND INTERPRETATION ON FEP

During the year the Commission continued to emphasize its information and interpretation policy as the primary means of obtaining compliance with the FEP law.

The Institute:

The Commission's consultation service was highlighted by a one-day institute for Employment on Merit held at Gannon College on February 28, 1955. The Administrator and Assistant Administrator of the Pittsburgh FEP Commission, and the Deputy Director of the Philadelphia Commission on Human Relations together with local consultants assisted the Commission in interpreting the FEP Ordinance and its application to the employment situation, to more than 70 representatives of local business, industrial, labor, educational and community organizations.

Morning discussion sessions were devoted to interpreting the FEP Ordinance as it affects the employer, the labor organization, the employment agency and the community in general. Afternoon sessions described the various ways and means by which affected organizations and persons could cooperatively implement the policy of employment on merit, and the consultation services of the Commission were described in detail.

In addition, the Commission obtained and distributed to all participants various resource materials on fair employment practices.

As a followup resource the Commission prepared a report of the Institute in the form of a series of questions and answers on problems raised during the discussion sessions. This report was distributed to all the Institute participants (See Appendix I).

Pre-employment Inquiry

During 1954, at the request of various employers, the Commission prepared a series of rulings

regarding lawful and unlawful pre-employment inquiries which was distributed widely through employer organizations.

In 1955, the Commission conducted a survey of employment application forms with the cooperation of the Greater Erie Chamber of Commerce and the Erie Manufacturer's Association. Local employers were invited to submit employment application forms to the Commission for review in terms of FEP law.

Sixty-one business and industrial firms participated in the survey. Of the total forms received, twenty-one, or 34 per cent, contained discriminatory items. In each instance where discriminatory items appeared recommendations for necessary deletions or changes were made to each firm and in some cases conferences were held with employers on specific problems. (See Appendix II for a summary of the review)

Discriminatory Advertising

One of the areas which, in the past, has been a source of indirect support of discriminatory practices in job advertising is the classified section of newspapers. During the year the Commission held conferences with representatives of local newspapers on this problem. The Commission has sought the cooperation of the newspapers in support of the intent of the FEP Ordinance, and has requested that the newspapers refuse to accept, as a matter of policy, classified ads which included any words or phrases, the purpose of which was to discriminate or support discriminatory practices.

The Commission has indicated that its consultation services were available to assist in the solution of any problems which might exist. Detailed interpretations of the proper and improper wording of ads were suggested and a proposed code of newspaper advertising was submitted to the newspaper representatives for their consideration and adoption.

During the year the Commission has maintained a continual review of the classified ads and when discriminatory items appear notice is sent to the newspaper and to the advertisers whenever possible.

The Community and FEP

The successful practice of employment on merit depends not only on the employer, labor organization and employment agency, but also on the understanding and support of the total community.

On economic grounds alone Erie cannot continue to consider race, color, religion, nationality or ancestry as barriers to training and employment opportunity. Nor should persons who happen to be members of any minority group fail to seek the necessary qualifications and apply for job opportunities according to their skills and abilities.

In the growing national demand for persons with advanced qualifications and vocational skills the Erie area will have to look more and more to its own present and future labor supply.

Qualified persons who have experienced discrimination in hiring and advancement because of race, color, creed, nationality or ancestry must know that their right to equal job opportunity is guaranteed by the FEP Ordinance. Such persons must have the confidence to seek the assistance and services of the Commission whenever necessary.

Parents, teachers, and counselors not only need to know of the changing policies and practices in employment opportunity, but they must encourage all young people to acquire the necessary vocational qualifications, and to seek and obtain employment according to their skills. Young people should know that the Commission is prepared to assist them when they experience discrimination in their efforts to acquire skills and obtain employment.

Religious, civic and community organizations and agencies which serve the citizens of Erie should not only support the idea of employment on merit as a matter of policy, but through their leadership should provide opportunities for study and discussion of FEP and the effects of employment discrimination among their memberships.

To assist community support for employment on merit the Commission has provided speakers, films, discussion materials and factual information to various groups. To date more than 4500 persons have been contacted through programs conducted for more than 40 religious, industrial, business, labor, civic and community organizations, and approximately 16,000 pieces of literature on FEP have been distributed through organizations in Erie.

III EDUCATION FOR CONSTRUCTIVE COMMUNITY RELATIONS

"The Commission is authorized to . . . formulate and carry out a comprehensive educational program designed to eliminate and prevent prejudice and discrimination based upon race, color, religion, national origin or ancestry."

The second responsibility of the Commission, as provided in the Ordinance, is obviously related to the first, that of administering the FEP Ordinance.

When employment discrimination exists in a community, it exists as part of a pattern of discrimination which, based upon lack of understanding, ignorance, fear, indifference and tradition, denies equal opportunity in housing, public accommodations and various other community services, as well as in employment.

The Commission, representing the citizens of Erie is aware that any educational program designed to eliminate prejudice and discrimination, and to establish harmony among various groups in the community can be achieved only through the joint effort of citizens and citizen groups interested in the practice of good citizenship.

To stimulate interest in, and concern for, constructive community relations the Commission, during the year, prepared and distributed an extensive bibliography and references list of educational materials to many organizations and persons in Erie. Printed materials and other educational aids dealing with specific aspects of community and inter-group relations problems were provided on request to clergymen, teachers, and others. The Commission members and staff accepted speaking engagements to discuss educational programs in community relations, and to assist groups in formulating study or action programs dealing with community relations problems.

The Commission, too, has serviced requests for information about racial and nationality groups in the City of Erie, has assisted students and student groups in planning programs and study projects dealing with various aspects of community relations, and has prepared displays of educational aids for meetings and conferences sponsored by a number of organizations in the community.

During the year the Commmission has experienced an increased demand for its educational services to the community. It is hoped this demand will grow during the coming year and that the Commission's assistance will be available to more and more citizens.

National Conferences:

In addition to its local program, the Commission maintains constant contact with various national, state and local public and private agencies working in the field of community relations. Such contacts provide the Commission with the experience and programs of other agencies throughout the country and help to keep the agency alert to recent developments and problems elsewhere. The Commission has on file a representative list of reports and studies prepared by various national, state and local agencies, which are available to students and study groups upon request.

During the year the Commission participated in two national conferences dealing with employment discrimination and community relations.

In April, at the invitation of Vice-President, Nixon, two Commission representatives attended a one-day conference in Washington, D. C. sponsored by the President's Committee on Government Contracts. This President's Committee was established to administer the non-discrimination clause contained in all Federal contracts. At the conference, representatives of 125 state and local agencies administering FEP laws discussed with members of the President's Committee ways and means of implementing the Federal non-discrimination policy.

During the program the conference participants were received by the President, who spoke of his concern about existing problems of employment discrimination, and expressed his appreciation for the work that was being done at state and local levels to deal with this and similar problems.

In December, two Commission representatives attended the annual three-day conference of the National Association of Inter-group Relations Officials held in Milwaukee. This annual conference is devoted to a review of developments in inter-group relations throughout the country during the year and provides an excellent opportunity for discussion of problems and programs in the field of community relations.

Reports and summaries of these conferences are available at the Commission office.

IV PLANS FOR THE FUTURE

During its two years of operation the Commission has had an opportunity to learn a great deal about the community it serves, to assess its purpose, and to devise program needs according to its experience.

From its experience the Commission may suggest certain long range goals and immediate needs which may assist in realizing the community objectives.

Long Range Goals:

A harmonious community in American society is one which provides respect for the individual as a person, which provides the opportunity for a decent job according to ability, a good home and family according to means, adequate education, the right to worship according to religious preference, the right to peace and safety in a wholesome community environment.

Such a community is certainly an ideal for every citizen. The realization of this ideal is sometimes limited by factors and circumstances over which the individual citizen has no control —economic depression, war, illness, injury, and so on, but, other problems and practices exist for which citizens are responsible and which citizens have the power to eliminate, if they will.

In every instance where race, color, religion, ancestry or nationality are considered as important measures of acceptability in employment, housing, public accommodations, education and other opportunities, so does the community, by intent, fail to achieve the wholesome environment it seeks to establish.

In so far as the advantages and opportunities available in any community are denied to any group or groups of citizens, so are the benefits of harmonious community life denied to all citizens.

To proceed firmly in the direction of progressive community goals, citizens from all groups must plan and work together for the eradication of those suspicions, tensions and traditions based on group difference, and the discriminatory practices they produce.

Immediate Needs:

1. Continued and expanded community efforts to support and establish employment on merit as a traditional practice in Erie.

2. Continued assistance and interpretation regarding FEP employers, labor organizations, employment agencies and employee groups.

3. The development and implementation of an assistance program designed to inform young people concerning vocational guidance, counseling and placement services.

4. The development of a practical community relations programs designed to eliminate discrimination in housing and the tension associated with this practice.

5. The establishment of an information and education program designed to build understanding and harmony among the various groups in the community, and to eliminate those traditions, suspicions and misunderstandings which produce and perpetuate prejudice and tension among groups.

6. A survey of existing programs carried on by local organizations to further constructive community relations.

To assist citizens in working for the fulfillment of some immediate needs in community relations the Commission plans to hold a Second Institute for Employment on Merit early this year. The purpose of the Institute will be to interpret the FEP Ordinance and, if possible, the recently enacted State FEP law, to employers, labor organizations, employment agencies, and representatives of community organizations; to aid employers and others in the implementation of employment on merit in the community; to review with employers and others any problems which may have developed in efforts to implement employment on merit during the past two years.

In order to achieve constructive programs in the solution of other community relations problems through cooperative citizen effort, the Commission plans to establish an Advisory Council to the Commission. Members of the Council, representing a cross section of com-

munity leadership, will assist the Commission by providing advice, experience and recommendations directed to the solution of problems and promotion of good will and harmony among groups in Erie through educational procedures.

Through the Council and otherwise the Commission will continue to serve citizens and citizen groups interested in information and program materials in constructive community relations.

CONCLUSION

In Erie, as in many other cities in the country, citizens through public and private effort have laid the foundation for a program designed to achieve the highest ends of a democratic society: to establish harmony and good will among people of diverse racial, religious, ethnic and cultural backgrounds for the good of all, and to cultivate respect for the dignity and rights of each citizen.

The efforts of local communities have been strengthened in recent years through the far-reaching significance of the Supreme Court decisions of May 1954 and May 1955 on segregation, and in Pennsylvania through the enactment of a State Fair Employment Practice law.

The Supreme Court as the highest legal body interpreting the law of the land, clearly established the standard of justice in support of American efforts for liberty among all citizens. The State FEP law established the right to equal opportunity in employment as a civil right throughout the Commonwealth of Pennsylvania.

The Supreme Court interpretation and the enactment of the State FEP law do not in and of themselves, institute changes in the traditions and practices of the past, but they do set new standards by which citizens can judge their public behavior toward one another, and they provide the basis for eliminating and modifying those traditions and practices which are harmful to the common good.

The Erie Community Relations Commission believes that its program, as a public agency, with the cooperation of many of Erie's citizens, has begun to work toward the realization of constructive community standards and practices among citizen groups. There have been signs of progress during the year. It is hoped that this progress will continue.

[*The appendices to the Report have been omitted*]

ATTORNEYS GENERAL

EDUCATION

School Teachers—Kentucky

The Attorney General of Kentucky was requested for an opinion concerning the assignment of Negro teachers following the integration of schools in Newport, Kentucky. The opinion suggests the possibility of a "test case" to determine the status of Kentucky statutes concerning tenure and assignment of teachers. The opinion follows:

May 9, 1956

Mr. A. D. Owens, Secretary
Newport Board of Education
Newport, Kentucky

Dear Mr. Owens:

This is in reply to your letter of April 25, 1956, wherein you stated that the Newport City Schools plan to complete the integration of white and colored children next year. In doing so, three teachers who hold continuing service contracts will be relieved of their positions, since one building will be closed which had been exclusively utilized as a colored school. Your specific question is whether there exists any obligation on the part of the Newport Board of Education to continue to employ these three teachers involved and to place them in classrooms where white children are in attendance.

In answer to your inquiry, your attention is directed to KRS 161.800. Under that statute the school board is given the authority to make reasonable reductions in the number of teachers employed because of a decreased enrollment, suspension of Schools, or territorial changes. In any integration plan there is obviously a "suspension of schools" and a "territorial change," if only in the fact that the separate colored territories are abolished. However, the suspension of contracts must be done on the recommendation of the superintendent who is required to give preference to teachers holding continuing contracts and teachers having greater seniority "within each teaching field affected."

Naturally you are familiar with the provisions of the Kentucky Constitution and with the statute known as the Day Law which prohibits white and colored children from attending the same school. The Supreme Court, in the case of Brown, et al v. Board of Education of Topeka, 347 U.S. 483, held such laws to be violative of the Fourteenth Amendment of the U.S. Constitution. Our Kentucky statute was not before the Supreme Court in that particular case, but the decision has undoubtedly invalidated it. It did not speak upon the subject of teachers, however, and only our own Kentucky statutes are controlling in the selection of teachers. The tenure statutes were enacted with separate systems of schools in mind. We are uncertain as to whether they have been struck down in part, at least, by the abolition of the systems to which they applied. We are not acquainted with any cases in other states which would be helpful in interpreting our tenure statutes in the light of the Supreme Court ruling, and certainly there have been no decisions in this state.

We believe it is going to be necessary for some school board and individual teacher to test the matter in the Court of Appeals, especially the phrase quoted above from KRS 161.800. In the absence of any "legal guideposts" in the way of court decisions, it would be useless for our office merely to speculate on what the court might say. We strongly recommend a test case.

Yours very truly,

JO M. FERGUSON
ATTORNEY GENERAL

By:
R. F. Matthews, Jr.
Assistant Attorney General

PUBLIC ACCOMMODATIONS

Hotels—Vermont

The director of the Vermont Development Commission requested an opinion of the Attorney General of that state with respect to the deletion of names of hotels and related places of public accommodation from various state listings where it had been established that such places practiced racial discrimination. The opinion expressed the view that discrimination on the basis of race by places of public accommodation was violative of the common law relating to innkeepers. The opinion follows:

No. 97
August 31, 1955

VERMONT DEVELOPMENT COMMISSION

Mr. Clifton R. Miskelly,
Managing Director,
Vermont Development Commission,
Montpelier, Vermont.

Dear Mr. Miskelly:

Receipt is acknowledged of your letter of July 18, 1955, in which you request the opinion of this office as to the listing in official state publications of "accommodation places" which practice discrimination against various racial groups. By the term "accommodation places" we presume your refer to hotels, inns, lodges, tourist homes, motels, cabins, etc.

You make reference to an earlier opinion on this subject by Honorable Clifton Parker, former Attorney General, but we can find no record thereof and believe he may have given you an informal opinion, of which there would not necessarily be a record.

We assume that, by official publications, you have in mind publications such as brochures prepared by the development commission and paid for out of the public purse and it is our understanding that the lists of accommodation places to which your letter refers are lists which are carried gratuitously in such publications.

The question to be decided is therefore whether or not the development commission may properly eliminate from such gratuitous listings in its state financed publications, the names of "accommodation places", where it is *established* that racial discrimination actually occurs.

As you undoubtedly are aware, we have no specific antidiscrimination law in this state which prohibits an individual from practicing discrimination against others. However, the common law relating to innkeepers has always been that such innkeepers must accommodate any members of the general public provided they are willing to pay a reasonable price therefor, and their character and conduct are unobjectionable.

Brown v. J. H. Bell Co. 146 Iowa 89, 123 N.W. 231.

Vermont adopted the common law early in our history, see section 1263, V.S. 47, which is substantially the same statute as that enacted in 1737 (see p. 30 Rev. of 1787), and we believe the rule set forth above as to the duty of innkeepers is the law in this state.

It must be noted, parenthetically, that the definition of an inn is a house where a traveler is furnished with everything he has occasion for while on his way, including food and lodging; Bouvier's Law Dictionary, 3d Rev. We are of the opinion, however, that even though under modern methods of doing business, many places now furnish only a lodging, that such places would be held within the rule here in question, as would eating places also.

The common law, which by adoption may be said to be the Vermont law, would, therefore, require an innkeeper to accommodate any person willing to pay a reasonable price and whose character and conduct are unobjectionable; supra. Those innkeepers who refuse a person accommodation simply because of his race, creed or color do so in contravention of such law.

We are of the opinion that the actual practice, by places of accommodation in Vermont of racial discrimination against the public in violation of the common law duties imposed upon such establishments is sufficient reason for the development commission to cease gratuitously listing them in official state publications.

However, should you delete such places from state publications, you have, we believe, other and powerful reasons to justify such action.

The very cornerstone of our nation and our state governments is based upon the equality of man as but a few brief references to constitutional provisions will instantly demonstrate.

"We hold these truths to be self-evident that all men are created equal."
Declaration of Independence.

All persons are entitled to the equal protection of the law.
U.S. Constitution Article XIV.

The right to vote is not denied on a basis of race or color.
U.S. Constitution Article XV.

"* * * all men are born equally free and independent, and have certain natural, inherent and inalienable rights * * *".
Vermont Constitution, Chap. 1, Article 1.

"* * * every member of society hath a right to be protected in the enjoyment of life, liberty and property * * *".

Vermont Constitution, Chap. 1, Article 9th.

In referring to the 13th, 14th and 15th amendment of the Federal Constitution it has been said:

"The fundamental principle pervading them is a guaranty of impartial equality of rights and privileges, civil and political, to all citizens of the United States and of the state where they reside * * *".
10 American Jurisprudence 895.

That the concept of equality of privilege is no idle theory was demonstrated in the now famous segregation cases before the United States Supreme Court on May 17, 1954, when that Court, speaking through the Chief Justice, in Brown v. Board of Education of Topeka 347 U.S. 483; 98 Lawyers Edition 873, held that the denial of equal access to educational facilities on a basis of race or color was a violation of the 14th amendment of the Federal Constitution. And we need no reminder of the Vermont blood which has been shed in the history of this country in defense of American democracy and the principles and ideals for which it stands.

To our mind the practice of discrimination, on a basis of race or color, by places of public accommodation, violates the fundamental concepts of our government—state and national. Under the circumstances we do not believe the public purse should be utilized to gratuitously advertise any public accommodations indulging in such activity and we are of the opinion you would be justified in deleting the names of such places from gratuitous listings in official state publications.

In view of the fact that this opinion has resulted from our joint efforts, we are both signing it.

Very truly yours,
ROBERT T. STAFFORD
Attorney General
FREDERICK M. REED
Deputy Attorney General

EMPLOYMENT

Fair Employment Laws—Minnesota

The Attorney General of Minnesota was requested by the City Attorney of Minneapolis to furnish an opinion with respect to the validity of a city ordinance prohibiting discrimination in employment following the enactment of a state Fair Employment Practices Act. The opinion stated that the city ordinance would be valid so long as it did not conflict with the provisions of the state act, and found no such conflict in the instant legislation. The opinion follows:

Mr. Charles A. Sawyer
Minneapolis City Attorney
Minneapolis 15, Minnesota
Attention: Mr. Palmer B. Rasmusson, Assistant City Attorney

Dear Sir:

In your request for an opinion of the Attorney General you state:

"We are transmitting herewith a copy of an ordinance passed by the Minneapolis

City Council on January 21, 1947 and later amended, prohibiting discrimination in employment, public or private. We also call your attention to Chapter 516, Laws of 1955 dealing with the identical subject, which act became effective on July 1, 1955. Alderman George W. Martens, one of the senior members of the City Council, has requested us to seek the Attorney General's opinion in regard to the application and effect of these regulations. There are two main questions with which we are concerned * * *.

"Both of these questions can be discussed jointly. In this respect we call attention to the fact that Chapter 516 neither specifically prohibits nor authorizes the enactment of any similar local legislation by any municipality. The ordinance was passed in the exercise of the police power of the city, Section 1, subsection 4, pursuant to the City Charter, Chapter 4, Section 5, vesting in the City Council authority to pass and enforce ordinances 'for the government and good order of the city', enumerating not less than 45 various subjects, the one here under consideration not being mentioned therein."

You ask these

QUESTIONS:

"1. Was it the intention of the State Legislature to preempt that particular field of legislation and regulation to the exclusion of any existing or future local regulation?

"If question No. 1 is answered in the negative, the following question arises:

"2. Does the difference between Chapter 516 and the ordinance with regard to the administrative machinery, the manner of procedure and the method of enforcement constitute such an inconsistency on the part of the ordinance as to render the ordinance invalid?"

OPINION

In its essence the problem stated in Question 1 is that of construing the validity of a city ordinance passed in the exercise of a municipality's police power and regulating certain conduct when there is present a state law regulating the same conduct and such state law neither specifically authorizes nor prohibits the existence of such ordinance.

The question appears to be one of first impression in regard to the specific area of fair employment practices legislation. This is true although states have had fair employment practices statutes and municipal ordinances coexisting for a number of years. See Rice and Greenberg, "Municipal Protection of Human Rights", 1952 Wisconsin Law Review 679, at 689, 696, where the authors note that such states are New York, Indiana, Wisconsin, Washington, and Colorado.

[*Considered by Court*]

The problem as stated above has been considered by the Minnesota Supreme Court in City of Duluth v. Cerveny, 218 Minn. 511, 521, 16 N. W. 2d 779, where the court stated the rule as follows:

> "A city ordinance covering a subject also covered by a state law is valid if it is consistent with the state law and preserves the standard of regulation as moulded by the general law."

See also State v. Weeks, 216 Minn. 279, 12 N. W. 2d 493; State v. Clarke Plumbing and Heating Co., 238 Minn. 192, 56 N. W. 2d 667; State v. Houston, 210 Minn. 379, 298 N. W. 358; 13 Dunnell's Digest (3d Ed.) § 6752, and cases cited.

McQuillin, Municipal Corporations (3d Ed.), § 15.22 states the rule thusly:

> "According to many authorities, an ordinance making additional regulations which are reasonable and consistent with a legislative regulatory act is not void as conflicting therewith. At least, as a general rule, a municipal regulation, additional to that of state law, does not occasion a conflict between the state law and an ordinance. Furthermore, although the legislature has regulated a given course of conduct by prohibitory enactments, a municipality may by ordinance enact such new and additional regulations in aid and furtherance of the purpose of general law as may seem fit and appropriate to the necessities of a particular

locality and as are not in themselves unreasonable or in conflict with general law. Thus, an ordinance not attempting to impose a new or different standard and not permitting what the statute prohibits or prohibiting what the statute permits and covering subject matter otherwise within municipal power is valid."

Based upon these authorities, it is our opinion that the mere fact of the passage of a state law prohibiting discrimination in employment based upon race, color, creed, religion, or national origin does not preempt the field of regulation so as to exclude a municipality from prohibiting the same conduct.

In answer to your precise question as to the legislative intent in enacting L. 1955, c. 516, the Minnesota State Act for Fair Employment Practices, it has been held that the fact that a state law contains no *express* provision as to the validity of a municipal ordinance governing the same conduct does not indicate a legislative intent to restrict the right of a municipality to regulate such conduct. State v. Houston, supra.

In this case the City of Minneapolis passed an ordinance regulating the grading, candling, sale, and purchase of eggs. Subsequently the state legislature passed a law relating to the same subject. The law contained no express provision either permitting or prohibiting a municipality from legislating on the same subject. Pursuant to this law, the State Department of Agriculture promulgated regulations relating to the grading and sale of eggs. Such regulations were substantially the same as the provisions of the city ordinance.

The Minnesota Supreme Court upheld the validity of the ordinance since there was no express provision in the state law prohibiting the municipality from legislating on the same subject and the court did not find anything in the state law from which a legislative intent to so prohibit might be implied.

[*Nothing to Prohibit*]

We likewise do not find anything in the state fair employment practices law from which a legislative intent to prohibit municipal fair employment practices ordinances might be implied.

In passing upon this question we may note that the passage of the state fair employment practices law has not removed the need for the continued existence of local fair employment practices ordinances. There are very often problems existing in local areas which may be more effectively dealt with by an ordinance which is supplementary to the state law and an important adjunct in preserving the standard of regulation as moulded by the state. See City of Duluth v. Evans, 158 Minn. 450, 452, 197 N. W. 737, and State v. Clarke Plumbing and Heating Company, supra. As two authors who have written on this subject put it (Elson and Schanfield, "Local Regulation of Discriminatory Employment Practices, 56 Yale L. J. 431, at 454 (1947)):

> "A municipal ordinance directed at employment discrimination should not be considered merely as a substitute for a state law, but as supplementing the state law just as the latter would complement the proposed federal law."

[*Criteria for Validity*]

We, therefore, come to a consideration of Question 2. As hereinbefore noted, a city ordinance covering the same subject matter covered by a state law is valid if said ordinance is consistent with the state law and preserves the standard of regulation as moulded by such state law. See cases cited supra.

Unquestionably, the purposes and policies of the Minneapolis fair employment practices ordinance are consistent with those of the state fair employment practices law, the basic purpose of both being to foster the employment of all individuals in this state in accordance with their fullest capacities, regardless of their race, color, creed, religion, or national origin. L. 1955, c. 516, § 1; Minneapolis City Ordinance 65:3, § 1.

Furthermore, both the state law and the Minneapolis ordinance apply to employers, labor unions, employment agencies, and governmental units and agencies. L. 1955, c. 516, § 3, Subd. 7; Minneapolis City Ordinance 65:3, § 3.

Both the state law and the Minneapolis ordinance specify certain acts of discrimination which are unlawful. L. 1955, c. 516, § 5; Minneapolis City Ordinance 65:3, §§ 3, 5, 6, and 7. Both create fair employment practices commis-

sions charged with the responsibility of effectuating the purposes and policies of the respective enactments. L. 1955, c. 516, § 6; Minneapolis City Ordinance 65:3, § 8.

It is in relation to these fair employment practices commissions that the portion of Question 2 dealing with the differences as to administrative machinery and the manner of procedure arise.

Under the Minneapolis ordinance the commission is charged with the duty of promoting cooperation among all groups and conducting studies, surveys, and projects and disseminating information concerning job discrimination and related problems. Minneapolis City Ordinance 65:3, § 8, Subd. (c) and (d).

[*Investigates Complaints*]

The commission also receives and investigates complaints of violations of the ordinance, holds hearings and makes determinations thereon, and enforces their determinations by means of prosecutions in the municipal court. Minneapolis City Ordinance 65:3, § 8.

The state commission, in addition to its research, study, and educational functions, also issues, receives, and investigates complaints alleging discrimination in employment. L. 1955, c. 516, § 7, Subd. 8, and § 8, Subd. 4. The commission may subpoena witnesses, books, and papers relating to the matter under investigation and may administer oaths and take testimony. L. 1955, c. 516, § 7, Subd. 1.

The state commission attempts to eliminate discriminatory employment practices by means of education, conference, conciliation, and persuasion. L. 1955, c. 516, § 7, Subd. 10, § 8, Subd. 4. If such efforts are unsuccessful, the commission requests the governor to appoint a board of review which conducts a public hearing at which the parties are represented, testimony taken, and, evidence received. L. 1955, c. 516, § 9, Subd. 4, 5, 7, and 8. If the board finds that an unfair labor practice has been committed, it makes findings and issues a cease and desist order or orders and takes such affirmative action as effectuates the purposes of the act. L. 1955, c. 516, § 9, Subd. 9.

From the foregoing it is clear that the major difference between the two enactments with regard to the administrative machinery and manner of procedure is that under the Minneapolis ordinance the fair employment practices commission performs the several functions (of education and research and of receiving, investigating, hearing, and determining the validity of complaints, as well as taking the steps necessary to see that the courts enforce such determinations) which are under the state law divided between the state fair employment practices commission and the board of review.

The combination of the functions of investigation and determination in one body, the Minneapolis fair employment practices commission, rather than in two bodies, a fair employment practices commission and a board of review, as in the state law, is not contrary to law. See Pike and Fischer, Administrative Law Digest, Vol. I, § 5, c. 2, p. 168, and cases cited therein; State ex rel. Ging v. Board of Education, 213 Minn. 550, 7 N. W. 2d 544.

The law does not require that a statute and an ordinance be identical in every respect. City of Duluth v. Cerveny, 218 Minn. 511, 16 N. W. 2d 779. An ordinance passed in the valid exercise of the police powers of a municipality need not contain procedures which are precisely co-extensive with those contained in a state law regulating the same conduct. So long as the ordinance does not either create a standard of regulation different from that moulded by the state law or become inconsistent with such state law, the ordinance is valid.

In our opinion, the ordinance in question violates neither of these requirements with respect to its administrative machinery and manner of procedure.

[*Enforcement Varies*]

There is a difference between the Minneapolis ordinance and the state law as to the method and means of enforcement.

The Minneapolis fair employment practices ordinance states in § 8 thereof that, after a hearing, the commission shall certify and recommend to the municipal court for prosecution those complaints which in the judgment of the commission are deemed violations of the ordinance. Sec. 9 provides that any person who shall violate or fail to comply with the provisions of the ordinance shall be guilty of a misdemeanor and shall be punished by a fine not

exceeding $100 or by imprisonment in the workhouse for a period not to exceed 90 days.

Sec. 9, subd. 9, of the state law provides that the board of review may issue an order directing the respondent to cease and desist from the unfair employment practice and to take such other affirmative action as in the judgment of the board will effectuate the purposes of the act.

Sec. 10 of the state law provides for enforcement of an order of the board of review by the institution of proceedings in the district court for the judicial district in which the unfair employment practice occurred or the respondent (employer, labor union, or employment agency) resides or has his principal place of business.

To enforce an order of the board the court is empowered to grant temporary relief by restraining order or otherwise or to make such orders in the matter as the interests of justice may require. L. 1955, c. 516, § 10, Subd. 8.

Sec. 11 provides that any person, employer, labor organization, employment agency, or party who shall wilfully violate any order of the district court shall be cited for being in contempt of court. Said section further provides that anyone found in contempt shall be punishable under M. S. 1953, § 588.10, which provides for imprisonment for not more than six months or a fine of not more than $250, or both.

[*Review Provisions Consistent*]

With regard to the fact that the board of review is granted power to issue orders requiring affirmative or negative action by the party found to have committed an unfair employment practice, we do not see wherein this would make the ordinance inconsistent with the state law. The fact that the municipal fair employment practices commission herein possesses lesser powers than those possessed by the state fair employment practices board is no ground for finding the two enactments to be inconsistent.

With respect to the difference in the penalty provisions of the state law and municipal ordinance, it is well settled in this state that:

> "Ordinances may be valid when they relate to the same matter as a state law, even though the punishment prescribed in both be not the same."

See City of Duluth v. Evans, 158 Minn. 450, 197 N. W. 737; State v. Weeks, 216 Minn. 279, 12 N. W. 2d 493.

In our opinion, there is nothing contrary to either the spirit or the letter of the state fair employment practices law in allowing the governing body of a municipality, such as the city council of Minneapolis, in the exercise of the police power granted by its city charter, to determine that local circumstances require either that the enforcement be in the municipal rather than in the district court or that the penalty for violation be a misdemeanor rather than contempt of court. In this regard note that the possible fine assessed is smaller and the period of imprisonment less under the ordinance than under the state law. See Duluth v. Evans, supra.

Very truly yours
MILES LORD
Attorney General
ROBERT LATZ
Special Assistant
Attorney General

FAMILY RELATIONS

Marriage—Washington

The Attorney General of Washington was requested to furnish an opinion whether the 1955 statute of that state prohibiting the inclusion of questions concerning race or religion on any application blank, form, license, etc., required by the state applied to marriage licenses. The opinion holds that the statute so applies and repeals by implication a 1939 statute requiring a statement of color by an applicant for a marriage license.

June 30, 1955

Honorable Tom A. Durham
Bellingham, Washington

AGO 55-57 No. 109

Dear Sir:

We have your letter of May 31, 1955, previously acknowledged, requesting our opinion upon the following question:

"* * * whether Chapter 87 of the Laws of 1955 applies to an application for a marriage license." It is our opinion that it does.

ANALYSIS

The answer to your question depends upon the affirmative answer to the following two questions:

1. Is a marriage license a state license and in issuing the same is a county auditor acting as an agent of the state?

2. Is that part of RCW 26.04.160 (Chapter 204, Laws of 1939, §4) requiring the applicant for a marriage license to state his color repealed by chapter 87, Laws of 1955?

In Maynard v. Hill, 31 L.Ed. 654, 657. Mr. Justice Field stated:

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract a marriage, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."

State ex rel. Taylor v. Superior Court, 2 Wn. (2d) 575, 579:

"Counties are but arms or agencies of the state organized to carry out or perform some functions of state government. They, as instrumentalities of the state, have no powers except those expressly conferred by the constitution and state laws, or those which are reasonably or necessarily implied from the granted powers." State ex rel. Board of Commissioners v. Clausen, 95 Wash. 214, State ex rel. Spokane v. Degraff, 143 Wash. 326, Spokane County v. Certain Lots in Spokane, 156 Wash. 393, Carpenter v. Okanogan County, 163 Wash. 18.

14 Am. Jur., Counties, §3, page 185:

"A county is a subdivision of the state, organized for judicial and political purposes. In other words, it is a political organization of certain of the territory within the state, particularly defined by geographical limits. It is not invested with any of the attributes of sovereignty. In other words, a county is a constituent part of the state government—a wholly subordinate political division or instrumentality, created and exisiting with a view to the policy of the state at large *and serving as an agency of the state for certain specified purposes.*" (Emphasis supplied)

We conclude, in answering our first question, that authority to marry is derived solely from the state through legislative enactments, that a county auditor is an agent acting for the state in taking applications for marriage licenses and in issuing the same, and that a marriage license is a state license.

We answer our second question as follows:

Chapter 87, Laws of 1955, §1, provides as follows:

"The inclusion of any question relative to an applicant's race or religion in any application blank or form for employment or license required to be filled in and submitted by an applicant to any department, board, commission, officer, agent, or employee of this state or the disclosure on any license of the race or religion of the licensee is hereby prohibited."

Section 12 of the Laws of 1866, as amended by chapter 204, Laws of 1939, in §4 thereof, states that:

"* * * each application shall state the name, address at the time of execution of application, age, color, occupation, birthplace, * * * *Provided*, That each county may require such other and further information on said application as it shall deem necessary: * * *"

Chapter 87, Laws of 1955, makes no reference to RCW 26.04.160, and therefore a repeal of any portion thereof would have to be by implication.

Peterson v. King County, 199 Wash. 106, at page 112:

"'It is a settled rule that repeals by implication, although not ordinarily favored in law, are nevertheless effective when it appears that a legislative act is intended to cover the entire field of legislation upon a particular subject, or that subsequent legislation is contrary to, and inconsistent with, a former act.' State ex rel. Spokane etc. Branch v. Justice Court, 189 Wash. 87, 63 P. (2d) 937."

State v. Becker, 39 Wn. (2d) 94, at page 97:

"'Repeals by implication are ordinarily not favored in law, and a later act will not operate to repeal an earlier act except in such instances where the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, or unless the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect.'"

It clearly appears that chapter 87, Laws of 1955, was intended by the legislature to cover the entire field of legislation on the subject of race or religion in the field of applications for state employment and state licenses. Insofar as color is required to be stated on an application for a marriage license, chapter 87 of the Laws of 1955, and chapter 204, Laws of 1939, §4, are so clearly inconsistent with and repugnant to each other that they cannot, by fair and reasonable construction, be reconciled and both be given effect. It is our opinion, therefore, that chapter 204, Laws of 1939, §4, insofar as it requires color to be stated by an applicant for a marriage license, is repealed by implication by chapter 87 of the Laws of 1955.

We hope that the foregoing analysis will be helpful to you.

Very truly yours,
DON EASTVOLD
Attorney General

HERBERT TIMBLIN
Assistant Attorney General

REFERENCE

THE THREE-JUDGE FEDERAL COURT

A Study of Injunctions Against Discriminatory State Action

Although the Eleventh Amendment to the Constitution forbids suits against states without their consent, the United States Supreme Court in 1908 held that the actions of a state official, even though taken directly pursuant to and authorized by a state statute, could be enjoined by a single federal district judge if the person seeking to enjoin the action alleged that the statute under which the official was acting was repugnant to the United States Constitution. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The possible implications of vesting such power in a single federal judge were not lost upon the states, and the decision evoked severe and widespread criticism. As a result, Congress exercised its power of control over the jurisdiction of inferior federal courts, granted under Article III, Section 2 of the Constitution, and provided that certain cases should be heard originally, not by the usual single-judge federal district court, but by a three-judge district court of special statutory constitution and jurisdiction. A right of direct appeal from the decisions of such a court to the Supreme Court of the United States was provided.

Several important recent cases in the field of race relations have involved at the outset the question of the jurisdiction of the three-judge court to hear and decide the particular case. In view of these cases and the possibility of others, this Study undertakes to describe the three-judge court, define its limits, and outline its application to current controversies that involve alleged racial discrimination.

I. STATUTORY BASIS

Necessary to an understanding of the composition and function of a three-judge court is a knowledge of the principal statutes that authorize its existence. These statutes are short and may conveniently be set forth in full.

STATE ACTION AND THE THREE-JUDGE COURT:

"Injunction against enforcement of state statute; three judge court required. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under such State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." June 28, 1948, c. 646, 62 Stat. 968, 28 U.S.C.A. § 2281.

CONGRESSIONAL ACTS AND THE THREE-JUDGE COURT:

"Injunction against enforcement of Federal statute; three-judge court required. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district

court or judge thereof unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title." June 25, 1948, c. 646, 62 Stat. 968, 28 U.S.C.A. §2282.

It should be noted that although Section 2281 and 2282 are somewhat analogous they cover entirely different situations. The former is concerned with state statutes and orders of state administrative boards or commissions, while the latter deals with Acts of Congress. Emphasis in this Study is placed on Section 2281, as most of the race relations cases involve state, rather than federal, legislation. Both Section 2281 and Section 2282, however, refer to Section 2284 of Title 28 of the Code, which makes the composition of the three-judge court and the procedure to be followed by that court identical in cases within either section.

COMPOSITION OF THE THREE-JUDGE COURT

"Three-judge district court; composition; procedure. In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State. If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.
"Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

"(3) In any case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(4) In any such case, the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of

the State." June 25, 1948, c. 646, 62 Stat. 968, 28 U.S.C.A., § 2284.

DIRECT APPEAL TO THE UNITED STATES SUPREME COURT

> **"Direct appeals from decisions of three-judge courts.** Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." June 25, 1948, C. 646, 62 Stat. 926, 28 U.S.C.A. § 1253.

It should be noted that direct appeal will lie from the three-judge court only where the case is properly before that court; and if the court was improperly convened, the United States Supreme Court will not hear the case on appeal. *Moore v. Fidelity & Deposit Co.*, 272 U.S. 317, 47 S.Ct. 105, 71 L.Ed. 273 (1926).

OTHER STATUTORY AUTHORIZATIONS:

In addition to sections 2281 and 2282, with which this Study is primarily concerned, Congress has provided for the three-judge district court in several other instances: A three-judge court is required where suits in equity are brought by the United States under the Interstate Commerce Act after the filing by the Attorney General of a certificate that the case is of public importance. (49 U.S.C.A. § 44). The three-judge court is also authorized for granting injunctions under anti-trust acts. (15 U.S.C.A. § 28). There are provisions for a three-judge court in certain instances under Communications Act of 1934 (47 U.S.C.A. § 401 (d)). And see 7 U.S.C.A. § 217, which provides for a three-judge court in certain matters arising under the Packers and Stock Yards Act of 1921.

II. HISTORY OF THE THREE-JUDGE COURT

Prior to the case of *Ex parte Young, supra,* the sole function of a three-judge court was to entertain, under specified circumstances, equity suits arising under the Sherman Anti-Trust Act and the Interstate Commerce Act. 32 Stat. 823 (1903). No thought had been given to the establishment of three-judge courts with jurisdiction over matters pertaining to injunctive relief sought against state action, as the general feeling prevailed that such actions were barred under the Eleventh Amendment. However, this opinion proved to be erroneous.

In *Ex parte Young*, officers of the state of Minnesota attempted to enforce transportation rates established by the state legislature, and a stockholder of a railroad sought an injunction in a single-judge federal court against the enforcement of the statute on the grounds that it violated the federal constitution. The judge granted the injunction. The attorney general of Minnesota refused, however, to obey the injunction, whereupon the federal court convicted him for contempt. In refusing the release of the attorney general on *habeas corpus,* the United States Supreme Court upheld the jurisdiction of the federal court and set down the rule that notwithstanding the Eleventh Amendment which prohibits individual suits against a state, federal courts, under appropriate circumstances, can issue injunctions against state officials seeking to enforce state statutes that violate the United States Constitution. Justice Harlan, in a strong dissenting opinion, pointed out that if the principles announced in the majority opinion became "firmly established . . . it would enable the subordinate Federal courts to supervise and control the official action of the States as if they were 'dependencies' or provinces." 209 U.S. at 175. This feeling was more strongly echoed among the states. Since the federal courts did not wish to release all power over such injunctive relief, the protest of the states at being subjected to the possible abuse of such injunctive powers vested in a single federal judge called for a compromise. Therefore, in 1911, Congress provided for three-judge courts, similar to the three-judge courts of today, with exclusive jurisdiction to entertain petitions for injunctive relief against the enforcement by state officials of unconstitutional state statutes. (Act of March 3, 1911, 36 Stat. 1087, 1162). The three-judge court device was adopted in the belief that the more careful consideration afforded each case when it was considered by three judges would minimize the possibility of arbitrary abuse of the injunctive power.

The major distinction between the 1911 three-judge courts and those as presently constituted is that the former were authorized to hear applications solely for interlocutory injunctions while the latter are authorized to entertain applications for permanent injunctions as well. Various amendments have increased the jurisdiction of the three-judge court to include orders of state boards or commissions as well as state statutes; to include petitions for final as well as interlocutory injunctions; to add the analagous statute granting injunctive relief from the operation of unconstitutional federal statutes; and to perfect the method of direct appeal to the United States Supreme Court. For a detailed discussion of the history of these statutes as well as of the early case law construing them, see 3 MOORE, FEDERAL PRACTICE, (1st ed. 1938) §§ 104.01 and 107.02; Pogue, *State Determination of State Law*, 41 HARV. L. REV. 623 (1928); Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795 (1934).

For the convenience of the reader it should be noted that the former statute providing for the three-judge court when the constitutionality of a state's action was questioned, was § 266 of the Judicial Code. The present § 2281 of Title 28, U.S.C.A. is, with minor modifications, the same section.

Purpose of the Three-Judge Court

The Supreme Court has upon several occasions discussed the general purpose of the three-judge court. For example, Mr. Chief Justice Hughes stated in *Stratton v. St. Louis-Southwestern Ry.*, 282 U.S. 10, 51 S.Ct. 8, 75 L.Ed. 135 (1930):

> "By the statute in its original form, the Congress sought to make interference by interlocutory injunction with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the presence of a court composed of three judges, as provided by the statute, was likely to secure . . . The gravity of this class of cases was recognized and it was sought to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction." 282 U.S. at 14.

The Court added that these purposes were not changed by the amendment placing final as well as interlocutory injunctions within the jurisdiction of the three-judge court.

Consistent with its general purpose, the three-judge court has rather limited jurisdiction. The narrowness of these limits was indicated by Mr. Justice Brandeis in *Ex parte Collins*, 277 U.S. 565, 48 S.Ct. 585, 72 L.Ed. 990 (1928), who said there that the three-judge court was "intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public." 277 U.S. at 567. In a footnote the Court quoted Senator Burton's opinion that the statute "evidently recognizes the superior degree of consideration and sanction which should be given to a state statute, and prevents hasty interference with the action of a sovereign state." 227 U.S. at 567, note 1.

In *Phillips v. United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941), Mr. Justice Frankfurter gave a full discussion of the purpose of the statute and emphasized the narrowness of its construction:

> "It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such legislation to a single judge, it was no less mindful that the requirement of three judges . . . entails a serious drain upon the federal judicial system. . . Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction . . . would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket. . . . The history . . . the narrowness of its original scope, the piecemeal explicit amendments which were made to it, . . . the close construction given the section in obedience to Congressional policy . . . combine to reveal [it] not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.
>
> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and

thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases." 312 U.S. at 250, 251.

Other aspects of these cases are discussed fully below.

III. THE MEANING OF "ANY STATE STATUTE" WITHIN 28 U.S.C.A. § 2281

At the outset, 28 U.S.C.A. § 2281 requires that plaintiffs must seek injunctive relief to restrain the enforcement of any "State statute" or "an order made by an administrative board or commission acting under state statutes." Prior to the Act of March 4, 1913, c. 160, 37 Stat. 1013, the statute did not include the words "enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State." The 1913 amendment added these terms, but of the amendment, Mr. Justice Holmes said in *Oklahoma Gas Co. v. Russell*, 261 U.S. 290, 43 S.Ct. 353, 67 L.Ed. 659 (1923):

> "The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. . . . But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest." 261 U.S. at 292.

In that case the defendants had argued that if the section "is construed with narrow precision" then mere "unconstitutionality of the order is not enough." The plaintiffs had attacked the constitutionality of a denial of an increase in rates by the Oklahoma Corporation Commission, and the Supreme Court ruled that a three-judge court had jurisdiction to hear the case, which had been brought seeking injunctive relief against the commission. It had been argued that not only must the administrative order be unconstitutional, but that the order must be based on an allegedly unconstitutional state statute. The Court cited earlier cases and rejected the argument. And in *Moore v. Fidelity & Deposit Co., supra*, the Supreme Court said with reference to the complainant's attack upon the order of a state insurance commissioner cancelling on the grounds of public policy the plaintiff's privilege of selling a certain type of automobile insurance within the state, "It may be assumed that the order was action of an administrative board within the meaning of that section [§ 266]." 272 U.S. at 320. In that case, the appeal was dismissed on other grounds.

But the invalidity of a state statute or order cannot be alleged incidentally, just to provide jurisdiction, if the crux of the case is in reality a local rather than a state-wide matter. For example, in *Wilentz v. Sovereign Camp, Woodmen of the World*, 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994 (1939), the Supreme Court held that it was without jurisdiction to hear a direct appeal from a three-judge court when the action sought to be enjoined essentially involved local officers, local taxes and local bonds. The state officers, though made party defendants, were not necessary defendants, and their presence did not bring the action properly within the statute providing for a three-judge court. The court stated,

> "The members of the Commission are not necessary parties to the suit, and there is no occasion for relief against them in addition to that sought against the Collector. The Commission, in the performance of its statutory duty, acts only to approve the exercise by local officers of an authority conferred on them as such. A suit to restrain the latter from carrying into execution a state statute by performance of the local function which it authorizes is not to be brought within the purview of § 266. . . ." 306 U.S. at 581.

The distinction that must be drawn between "state" and "local" officers within the purview of Section 2281 is discussed more fully *infra*.

28 U.S.C.A. § 2281, in speaking of "any state statute" also includes provisions in state con-

stitutions. In construing this point under § 266, Mr. Justice Douglas for the Court said, *A.F.ofL. v. Watson,* 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946),

> "The question is whether within the meaning of that section 'statute' is restricted to legislative enactments or includes provisions of state constitutions as well. . . . It would . . . be somewhat incongruous to hold that a single judge, while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution alone were involved. The policy [of § 266] admits no distinction between state action to enforce a constitutional provision and state action to enforce an act of the legislature. . . . In our view the word 'statute' in 266 is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions." 327 U.S. at 592, 593.

In this case, a three-judge court had been convened to pass upon an anti-closed shop provision of the Florida constitution, and it had determined that the provision was not in conflict with the United States Constitution. Although the Supreme Court agreed that the circumstances called for the convening of a three-judge court, the case was reversed and remanded pending a determination of the validity of the provision by the Supreme Court of Florida.

IV. THE MEANING OF "OFFICER" WITHIN 28 U.S.C.A. § 2281

28 U.S.C.A. § 2281 requires that plaintiffs, in addition to asking for injunctive relief from a three-judge court, must seek to restrain "the enforcement, operation, or execution of any state statute *by restricting the action of any officer of such state . . .*" (italics added). *Ex parte Collins,* 277 U.S. 565, 48 S.Ct. 585, 72 L.Ed. 990 (1920) indicated the construction that the courts have placed on the term "officer of such state." The petitioner in this case sought a writ of mandamus from the Supreme Court to compel a district judge to convene a three-judge court. Petitioner alleged that his suit seeking to restrain a city from paving a street and paying for the improvement with a bond issue, following a state enabling act, was within the scope of §266. In refusing leave to file the petition, Mr. Justice Brandeis for a unanimous Court held that plaintiffs were not entitled to a three-judge court since they sought injunctive relief against the actions of a local rather than a state officer, even though the officer was attempting to enforce allegedly unconstitutional state law in its applicability to the local scene. Mr. Justice Brandeis stated for the Court,

> "Congress realized that in requiring the presence of three judges, of whom one must be a Justice of this Court or a circuit judge, it was imposing a severe burden on the federal courts. The burden was imposed because Congress deemed it unseemly that a single district judge should have power to suspend legislation enacted by a state. That the section was intended to apply only to cases of general importance is shown by the provision that notice of the hearing must be given to the Governor and the Attorney General—a precaution which would scarcely be deemed necessary in a suit of interest only to a single locality. . . If the temporary injunction had been issued, the result would have been merely to delay a municipal improvement. Though here the alleged unconstitutionality rests in the enabling statute, the case does not differ substantially from one where the sole claim is that a city ordinance is invalid. . . . It is . . . municipal action, not the statute of a State, whose 'enforcement, operation, or execution' the petitioner seeks to enjoin." (Footnote by the Court omitted.) 277 U.S. at 569.

In *Ex parte Public Bank,* 278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202 (1928), the Supreme Court again denied a writ of mandamus sought to compel the convening of a three-judge court. The Supreme Court held that the officers sought to be enjoined where local officers, in that case municipal tax officials, proceeding under a state statute to collect taxes for the benefit of the city. The court relied heavily on *Ex parte Collins,* discussed *supra,* and then added:

> "The suit here involved the constitu-

tionality of a state statute, but it was not brought to restrain 'the action of any officer of such State in the enforcement' thereof. The persons sued are municipal officers, having no state functions to perform, but charged only with the duty of collecting and receiving taxes assessed by other city officials in no respect for the use of the state but for and in behalf of the city alone . . . . [Section 266 reads] '. . . action of any officer of such state. . . .' In other words, [the plaintiff asks us] to ignore the quoted words and read the section as though they were not there.

"But we are not at liberty to deny effect to a part of the statute." 278 U.S. at 104.

In *Rorick v. Commissioners,* 307 U.S. 208, 59 S.Ct. 808, 83 L.Ed. 1242 (1939), Mr. Justice Frankfurter, for a unanimous Court, held that an appeal from a three-judge court did not lie to the Supreme Court, since the officers against whom plaintiffs sought injunctive relief were acting in a purely local capacity and the statutory court therefore lacked jurisdiction. The defendant officers, though state officials, were acting in the particular case in a matter which concerned only a single taxing district. The officers in the performance of their duties had endeavored to enforce certain changes in rates, collection and disposition of taxes of the district. The plaintiffs had alleged that the changes sought to be enforced amounted to a denial of due process and a three-judge court had been convened. The court stated,

"An official though localized by his geographic activities and the mode of his selection may, when he enforces a statute which 'embodies a policy of statewide concern,' be performing a state function within the meaning of §266. *Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89 [dicussed fully *infra*]. Conversely a state official charged with duties under a statute not of statewide concern is not a state functionary within the purposes for which § 266 was designed. What was a matter of local concern in [a prior case on the same facts]—the administration of the affairs of the District—remains matter of local concern in the present suit. . . . Decree vacated." 307 U.S. at 212, 213.

In *Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935) the Court drew an important distinction between "state" and "local" officers. The State of New York had passed a law making it a misdemeanor to violate any provisions of a code of fair competition as approved by the President of the United States under the N.I.R.A. Appellant, a retail car dealer, sought to restrain the District Attorney of New York City from instituting a criminal proceeding against him. A three-judge court dismissed the complaint, and the Supreme Court affirmed, though modifying the decree. Mr. Chief Justice Hughes for the Court said:

"If the District Attorney of the County of New York is to be deemed a local officer, performing a local function in a matter of interest only to the particular county . . . we are without jurisdiction of this direct appeal from the District Court. . . . Despite [the] provision for local elections, the district attorney in each county has been regarded as a state officer performing a state function and taking the place, in respect to his duties within the district or county, of the attorney general, upon whom at the outset these duties had been laid. . . ." 295 U.S. at 92, 93.

"In the instant case it is manifest that the statute under attack attempted to establish a statewide policy, and not one merely in the interest of the particular county. The defendant is charged with the duty of enforcing the statute by prosecuting those who disobey it, and in performing that duty he acts not merely in the local interest but in the name of the people of the State in compelling observance of its laws." 295 U.S. at 95.

The Court concluded that the officer here was a 'state officer' within the meaning of the statute, and affirmed the three-judge court's denial of injunctive relief on the ground that exceptional circumstances, not shown to exist, would be necessary to enjoin a criminal statute.

Mr. Justice Frankfurter's language in the *Rorick* case suggests that the important factor for consideration in determining jurisdiction under § 2281 is whether the officer is "performing a state function" which embodies "*a policy of statewide concern*" (emphasis added) as opposed to a lack of such statewide concern.

Several of the more recent cases involving race relations present the problem of defining

'officer of such state' with the meaning of § 2281. *Brown v. Board of Education*, 98 F.Supp. 797 (D.C. Kan. 1951), one of the cases consolidated on appeal for the decision in the *School Segregation Cases*, involved allegations that certain Kansas statutes authorizing segregation were unconstitutional. The plaintiffs sought interlocutory and permanent injunctions against the enforcement of the statutes, as well as a declaratory judgment as to the constitutionality of the statutes. The action was brought against the school authorities of a city in Kansas. The court assumed jursidiction, discussed the substantive constitutional issue involved, and did not discuss whether the defendants applying statutory law to one community were officers of the state enforcing a general statute. That such a case does fall within the jurisdiction of the three-judge court with a subsequent right of direct appeal was made clear, however, by the fact that the Supreme Court took and heard the appeal.

School Officials

Briggs v. Elliott, 98 F.Supp. 529 (E.D.S.C. 1951), another case among those constituting the *School Segregation Cases*, involved a suit for a declaratory judgment and injunctive relief alleging that both constitutional and statutory provisions of South Carolina law requiring segregated public school facilities violated the Equal Protection clause of the Fourteenth Amendment. The defendants were, as Judge Parker put it, ". . . school officials who, as officers of the state, have control of the schools in the district." 98 F.Supp. at 531. The opinion expressed no doubts as to the case's falling within the proper jurisdiction of a three-judge court.

The third of the three cases arising from three-judge courts and consolidated for the opinion in the *School Segregation Cases* is *Davis v. County School Board*, 103 F.Supp. 337 (E.D.Va. 1952). The plaintiffs sought declaratory judgments and injunctive relief, alleging the unconstitutionality of a section of the Virginia Constitution and of its statutory counterpart both of which required segregated public schools. The defendants were the members of a county school board. No mention was made in the opinion of any question of want of jurisdiction of the three-judge court. In all three cases appeals were perfected under § 1253 directly to the Supreme Court.

V. THE NECESSITY FOR INJUNCTIVE PRAYER AND OTHER EQUITY ASPECTS § 2281

The jurisdiction of a three-judge court is not properly invoked except upon a prayer for injunctive relief. In *Smith v. Wilson*, 273 U.S. 388, 47 S.Ct. 385, 71 L.Ed. 699 (1927) the plaintiffs filed their bill in the federal District Court for the Southern District of Texas against the defendants, county tax commissioners, asking injunctive relief to restrain the defendants from levying certain assessments on the plaintiffs lands. In spite of the allegations, the plaintiffs sought no preliminary injunction. Nevertheless, a three-judge court was convened, heard the suit, and dismissed the bill on the merits. On direct appeal to the United States Supreme Court the entire action was dismissed. The Supreme Court held that the three-judge court had no jurisdiction of the proceedings and that a direct appeal would not lie. The Supreme Court stated,

> "We conclude that the section as amended does not require a court of three judges on the final hearing unless an application for preliminary injunction is pressed to a hearing. In that case, an appeal either from the determination of the preliminary application or from the final decree may be taken directly to this Court. The plaintiff is thus given an election. He may either make application for an interlocutory injunction, which must be heard by three judges, in which case the final hearing must be before a like court with appeal directly to this Court, or he may not press an application for an interlocutory injunction, in which case the final hearing may be before a single judge, whose decision may be reviewed by the circuit court of appeals and this Court under other applicable provisions of the Judicial Code. Here there was no application for an interlocutory injunction and hence no necessity for a final hearing before three judges . . . ." 273 U.S. at 391.

In *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952), the complainant sought in its bills both a declatory judgment and injunctive relief against a state commission that allegedly was interfering with complainant's transporting motion picture films within the state. Wycoff contended that such action constituted interference with interstate commerce; the commission contended that the activities constituted intrastate commerce only. In reversing the Court of Appeals and ordering dismissal of the complaint, the Supreme Court said that the complainant

> ". . . appears to have abandoned the suit as one for injunction but seeks to support it as one for declaratory judgment, hoping thereby to avoid both the three-judge court requirement and the necessity for proof of threatened injury." 344 U.S. at 241.

The Court denied the declaratory judgment, since the question presented was hypothetical. It also denied the complainant injunctive relief for failure to show an act of the defendant that would lead to irreparable damage.

And in *Moore v. Fidelty & Deposit Co.*, 272 U.S. 317, 47 S.Ct. 105, 71 L.Ed. 273 (1926), an insurance company sought to restrain the order of the Oregon Commissioner of Insurance cancelling the company's authorization to sell a certain type of policy within the state on the ground that the order violated due process. A final injunctive decree was framed by a single-judge court, without consideration of the constitutional question, and an appeal allowed directly to the Supreme Court. In dismissing for lack of jurisdiction, Mr. Justice Brandeis noted that the statute as it then read allowed a direct appeal ". . . to this court . . . only where an application was made for an interlocutory injunction and the case was heard before three judges." 272 U.S. at 321. The Court pointed out that the company's omission of this prayer was one factor in causing the Supreme Court to refuse jurisdiction in the case.

Equitable in Nature

Closely related to the requirement of a prayer for injunctive relief as a jurisdictional basis for a three-judge court is the fact that Section 2281, as interpreted by the courts, is basically equitable in nature. The Supreme Court clearly indicated this premise in *A.F.ofL. v. Watson*, discussed *supra*, in stating:

> "But even though a district court has authority to hear and decide the case on the merits, it should not invoke its powers unless those who seek its aid have a cause of action in equity. . . . The power of a court of equity to act is a discretionary one. . . . Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent. . . .' . . ." 327 U.S. at 593.

In *Prentis v. Altantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), plaintiffs sought in the federal circuit court to enjoin defendant members of the Virginia Corporation Commission from enforcing an order fixing passenger rates. The plaintiffs alleged that the orders were in violation of the Fourteenth Amendment. The United States Supreme Court did not discuss the question of the three-judge court, since the case arose prior to the three-judge statutes. However, on the question of federal court jurisdiction, the Supreme Court held that it was not timely "to entertain the bills at the present stage," but that the statutory appeal of the order then pending before the state Supreme Court should be first concluded. On the other hand, a later case apparently involving similar facts reached a different conclusion. *Oklahoma Gas Co. v. Russell*, 261 U.S. 290, 43 S.Ct. 353, 67 L.Ed. 659 (1923) involved denial of a request for rate increases by the Oklahoma Corporation Commission. Following the denial, and pending a statutory appeal to the Oklahoma Supreme Court, plaintiff sought temporary and permanent injunctions before a three-judge court, alleging the outstanding rates to be confiscatory and unconstitutional. The three-judge court took jurisdiction, but dismissed the case on the authority of the *Prentis* case. The Supreme Court, through Mr. Justice Holmes, found that to wait would deprive the plaintiffs of any adequate remedy. "Rules of comity or convenience must give way to constitutional rights." 261 U.S. at 293. However, Mr. Justice Holmes attempted to distinguish the *Prentis* case stating,

> "[In that case] there was no doubt as to

the jurisdiction of the circuit court, but simply a decision that the bills should be retained to await the result of appeals if the companies saw fit to take them. 211 U.S. 232. The companies had made no effort to secure a revision and there had been no present invasion upon their rights, but only the taking of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the state." 261 U.S. at 293.

In *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935), the plaintiff sought to enjoin the defendant district attorney from instituting a criminal proceeding against plaintiff for an alleged violation of a state "fair trade" law which plaintiff believed to be unconstitutional. The Supreme Court held that the appeal from the three-judge court should be dismissed, not because the case was one properly for a single-judge district court but because the bill of complaint failed to "state a case within the equitable jurisdiction of the District Court." 295 U.S. at 97. Mr. Chief Justice Hughes for the Court relied on the general rule that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional, and said further:

> "To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights . . . . [O]therwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged." 295 U.S. at 95.

In this case, the Court found that the state officers did not intend further to prosecute the petitioner under the New York Code of Fair Competition for the Motor Vehicle Retailing Trade pending the outcome of litigation in the state courts.

In *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), petitioners, Jehovah's Witnesses, sought to enjoin the enforcement of a city ordinance that allegedly violated freedom of speech as guaranteed by the federal Constitution. The district court, as a single judge, had jurisdiction in view of the municipal character of the law involved, but the Supreme Court stated as a general proposition,

> "Notwithstanding the authority of the district court, as a federal court, to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity. Want of equity jurisdiction, while not going to the power of the court to decide the cause . . . , may nevertheless, in the discretion of the court, be objected to on its own motion. . . . Especially should it do so where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court." 319 U.S. at 162.

In *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948), a case arose under § 266 of the Judicial Code challenging the constitutionality of a certain South Carolina statute regulating shrimp fishing. A three-judge court was convened, denied an injunction, and dismissed the suit. In argument defendants had sought to interpose the doctrine of clean hands in order to prevent the plaintiffs from obtaining injunctive relief, since some of the plaintiffs had previously been convicted of shrimping out of season and in inland waters. As to this aspect of the case, the Court, through Mr. Chief Justice Vinson said:

> "The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree." 334 U.S. at 393.

Thus by implication in another factual situation, a three-judge court might decline, through its discretionary equity powers, to reach the merits upon a showing of unclean hands. In *Durant v. Bennett*, 54 F.2d 634 (W.D.S.C. 1931), a three-judge court dismissed claims for injunctive relief by owners of slot machines, relying in part on the bad faith of the plaintiffs and invoking the clean hands doctrine.

The amendment to § 266 in 1942 was looked on by some commentators as an attempt to prohibit *any* dismissal by a single district judge, 62 *Harv. L. Rev.* 1398 (1949). But the subsequent case of *Priceman v. Dewey*, 81 F.Supp. 557 (E.D. N.Y. 1949), involved a dismissal by a single judge on the grounds that no equitable grounds for relief existed. The petitioner had

sought to enjoin state criminal proceedings alleging that the state statute unconstitutionally imposed penalties against persons who accepted gratuities in addition to regular charges for the leasing or rental of real property. The single district judge ruled that criminal proceedings would not be enjoined in the absence of a showing of irreparable injury, and concluded that established cases did not require him to convene a three-judge court.

VI. THE MEANING OF "UNCONSTITUTIONALITY" UNDER 28 U.S.C.A. § 2281

Title 28 U.S.C.A. § 2281 states that bills for injunctive relief must allege the unconstitutionality of a state statute. As discussed earlier, the Court has interpreted the language of the predecessor of Section 2281 (§ 266) to include the unconstitutionality of an order made by a state administrative board or commission.

In *Herkness v. Irion*, 278 U.S. 92, 49 S.Ct. 40, 73 L.Ed. 198 (1928), the plaintiff's bill had challenged the validity under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of an order of an administrative board of the State of Louisiana. A single federal judge granted a restraining order and a three-judge court was convened. The problem in the case was the constitutionality of the action of the Louisiana Commissioner of Conservation in refusing petitioner permission to build a gas processing plant. Proper applications for a restraining order and a permanent injunction were made, as was an allegation of threatened irreparable injury. The three-judge court heard the case on the jurisdictional point, and dismissed the action as not being within the purview of Section 266. *Herkness v. Irion*, 11 F.2d 386 (E.D. La. 1926). The court drew a distinction between an allegation of unconstitutional action on the part of the state officers as opposed to allegations of the unconstitutionality of the statute under which they act. The court admitted that,

> ". . . if the unconstitutionality of such an order was well pleaded, this court would have jurisdiction and owe a duty to try the question whether a preliminary injunction should issue, despite the fact that the unconstitutionality of the statute is not pleaded." 11 F.2d at 388.

The court then held that neither element was present or properly pleaded; the only issue in the case was the constitutionality of the acts of the state officers; and as the plaintiffs had an adequate remedy at law in the state courts against those officers, jurisdiction would not lie under Section 266. On direct appeal, the Supreme Court quickly resolved any jurisdictional questions and based its award of a permanent injunction on an interpretation of the state enabling act which would not permit such arbitrary action by the Commissioner. In reversing the three-judge court, the Supreme Court stated,

> "As the bill challenged the validity under the Federal Constitution of an order of an administrative board of the State, the District Court had jurisdiction under § 266. . . ." 278 U.S. at 93, 94.

Must Be Substantial

Though not expressed in §2281, the Supreme Court has frequently asserted that the constitutional question involved must be substantial. In *Ex parte Poresky*, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933), the Supreme Court in a per curiam opinion refused to allow an application for leave to file a petition for a writ of mandamus to compel the convening of a three-judge court. In so doing the Court upheld the action of a single district judge who had refused to convene a three-judge court and had dismissed a prayer for injunctive relief. The plaintiff had sought to restrain officers of the state of Massachusetts from enforcing the state law that required automobile insurance. The Supreme Court said:

> "The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within § 266 of the Judicial Code, a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be [citing cases]. But the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction. In the ab-

sence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented. 'A substantial claim of unconstitutionality is necessary for the application of § 266.' *Ex parte Buder*, 271 U.S. 461, 467: [discussed *infra*]. . . That provision [Section 266] does not require three judges to pass upon this initial question of jurisdiction."

"The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. [citing cases] The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'. [citing cases]" 290 U.S. at 31, 32.

The Supreme Court agreed with the district judge that the plaintiff had not made a substantial showing of a violation of the United States Constitution, and refused plaintiff's application for a writ of mandamus.

Earlier, Mr. Justice Brandeis for the Court had written the decision in *Ex parte Buder*, 271 U.S. 461, 48 S.Ct. 557, 70 L.Ed. 1036 (1926) on which the Court in *Ex parte Poresky* relied. In the *Buder* case a bank had sought to enjoin the operation of state laws that had not been clarified by state judicial interpretation subsequent to the passage of new congressional legislation. The question was either one of the interpretation of the national legislation, or, in the alternative, the interpretation of state legislation. The Supreme Court concluded:

"But in neither of these questions is the constitutionality of the state statutes involved; and a substantial claim of unconstitutionality is necessary for the application of § 266." 271 U.S. at 467.

Following *Ex parte Poresky*, the Court stated in *California Water Service Co. v. City of Redding*, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323 (1938), that the one-judge district court had the affirmative duty to scrutinize the bill of complaint in search of a substantial federal question. The Court went on to state per curiam:

"The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." 304 U.S. at 255.

The plaintiff had alleged that certain federal grants to a city were unconstitutional, and that therefore the acts of the city officials in receiving such grants were illegal. Between the time of filing of the suit and its hearing by the three-judge court, a holding by the Supreme Court in another unconnected case had resolved the question of the constitutionality of the grants. The three-judge court had therefore dismissed on the grounds that no substantial constitutional question remained for consideration by a statutory court, and the Supreme Court agreed, saying,

"We think that the Act of August 24, 1937, did not contemplate that a court of three judges should be convened, or, if convened, should continue to act, merely for the decision of a local question where no substantial federal question is involved." 304 U.S. at 256.

The Supreme Court adopted a similar point of view in *Ex parte Bransford*, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249 (1940). In that case, the tax collector of a county had been sued by a bank in the federal district court in an attempt to enjoin the collection of certain taxes, which the bank alleged to have been levied in an unconstitutional manner. There was no contention that the statute under which the levy was made was invalid; the allegation of unconstitutionality was aimed rather at the manner of assessment and collection. Mr. Justice Reed, writing for a unanimous court, affirmed the position taken earlier in the *Poresky* and *California Water Service Co.* cases, and denied a petition for mandamus brought to secure a three-judge court. The opinion stated,

"It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed

at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction. . . . [B]y an omission to attack the constitutionality of a state statute, its validity is admitted for the purposes of the bill. . . . Even where the statute is attacked as unconstitutional, § 266 is inapplicable unless the action complained of is directly attributable to the statute." (Footnotes by the court are omitted) 310 U.S. at 361.

The latest statement of the Supreme Court requiring a substantial constitutional question as a jurisdictional requirement for a three-judge court occurred in *Phillips v. United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941). That case involved the action by the Governor of Oklahoma in declaring martial law in an area of the state. The Grand River Dam Authority, an agency of the State of Oklahoma, had been empowered to build a dam within the borders of Oklahoma. The governor had several times pressed before the Authority claims for the value of roads to be flooded by the dam. When the dam was nearing completion, with no apparent action on the part of the agency toward making payments for the roads, the governor declared martial law within the area, and by use of the state militia stopped work on the dam. Since the dam was financed with federal funds, the United States brought suit in the local district court. A three-judge court was convened to hear the case on the theory that the action of the governor was unconstitutional and that therefore a statutory court was necessary under § 266.

Upon appeal to the Supreme Court, Mr. Justice Frankfurter in a unanimous opinion wrote,

> "Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the Congressional scheme of § 266. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but merely assailed the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a 'statute', within the meaning of § 266 is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness." 312 U.S. at 252.

Nor is a substantial constitutional question present if the plaintiff concedes the constitutionality of the state statute. For example, in *Ex parte Hobbs*, 280 U.S. 168, 50 S.Ct. 83, 74 L.Ed 353 (1929), the plaintiff for the purpose of a motion had conceded the constitutionality of a Kansas rate-making statute. The single federal district judge interpreted the statute not to require the revocation of a license for violation of the rate order, and granted an injunction against what he construed to be an improper interpretation of the statute. In affirming that a three-judge court was not required, the Supreme Court denied the defendants "the power to force upon the plaintiffs a constitutional issue which at that moment they did not care to raise." 280 U.S. at 172.

VII. THREE-JUDGE COURT JURISDICTION EXCLUSIVE—ONE JUDGE CANNOT REACH MERITS

Another line of cases has established with equal firmness that a one-judge court lacks jurisdiction under the statute to pass upon the merits of the alleged constitutional infringement against which the complainant seeks injunctive relief. *Ex parte Metropolitan Water Co.*, 220 U.S. 539, 31 S.Ct. 600, 55 L.Ed. 575 (1911), involved lands condemned by the State of Kansas for the purpose of widening the Kansas River. While the condemnation proceedings were pending before the United States Court of Appeals for the Eighth Circuit, the State Legislature passed an act authorizing a summary appropriation of the lands by the State Attorney General, with a provision for payment to the land owners. Immediately after the passage of this act, petiti-

oners sought in a United States District Court to restrain the Attorney General from appropriating petitioners' land. Although the statutory requirement for a three-judge court was pointed out, the single judge heard the case, and, satisfied with the constitutionality of the state statute, vacated a prior temporary restraining order against the Attorney General and refused to issue a temporary injunction. Upon filing of a petition in the Supreme Court for mandamus to compel the convening of a three-judge court, Mr. Chief Justice White commented:

> ". . . [T]he statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious, as the appeal allowed to this court is from an order denying as well as from an order granting an injunction." 220 U.S. at 545.

The Supreme Court issued a writ of mandamus to compel the calling of a three-judge court.

Similarly, in *Ex parte Northern Pacific R. Co.*, 280 U.S. 142, 50 S.Ct. 70, 74 L.Ed. 233 (1929), the Court ordered a district judge to assemble a three-judge court. That case concerned a petition for a temporary restraining order and an interlocutory injunction against the enforcement of certain rate orders issued by the Board of Railroad Commissioners of Montana, which petitioner alleged to be in violation of certain commerce laws of the United States, as well as unconstitutional. One district judge had granted the restraining order pending final determination by a three-judge court, but before the court could be assembled another judge had dissolved this temporary order and dismissed the bill on the merits. Upon petition for mandamus to compel the latter judge to vacate his decree dismissing the bill and to assemble the necessary three-judge court, the Supreme Court said per curiam:

> "Under our decisions construing and applying the sections, [one judge] . . . was without jurisdiction to hear either the motion to dissolve the temporary restraining order or the motion to dismiss the bill on the merits. In the presence of the applications for an interlocutory injunction—which was at no time withdrawn but constantly pressed—a single judge . . . was as much without authority to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction. Our decisions leave no doubt on these points. [citing cases]." 280 U.S. at 144.

In *Stratton v. St. Louis Southwestern Ry.*, 282 U.S. 10, 51 S.Ct. 8, 75 L.Ed. 135 (1930), the jurisdiction of a Circuit Court of Appeals over a single district judge's dismissal of a bill alleging the unconstitutionality of certain state tax statutes and praying for temporary and permanent injunctions against their enforcement was involved. The petitioner had been granted a temporary restraining order by a single district judge against the Illinois Secretary of State and others, enjoining the defendants from enforcing the statutes, pending the determination of the application for an interlocutory injunction. While this temporary order was in force, another district judge sitting alone heard and granted a motion to dismiss the bill for lack of equity. The Circuit Court of Appeals entertained an appeal from this dismissal, determined the statute in question to be unconstitutional, and reversed the District Judge. Upon further appeal, the Supreme Court reversed and remanded to the Circuit Court for dismissal on the basis of lack of jurisdiction.

Mr. Chief Justice Hughes, writing for the Court said:

> "If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administration order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction." 282 U.S. at 15.

The Court went on to point out that this was clearly a case for three judges, that the judge who had granted the restraining order had not acted with proper speed in convening a three-judge court and that mandamus would lie to compel such action. However, the court added,

> "It is not necessary . . . that formal application should be made for such a writ, as

the District Judge may now proceed to take the action which the writ, if issued, would require." 282 U.S. at 18.

Thus by 1942, it was well settled that a single district judge not only could but should determine the presence or absence of a substantial constitutional question before convening a three-judge court under § 266. And it was of equal certainty that he had no jurisdiction to dismiss on the merits. Congress in 1942 passed an amendment to what is now § 2284 of the Judicial Code, to make this section read in § 2284 (5):

". . . A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, *or dismiss the action,* or enter a summary or final judgment." (emphasis supplied).

Several commentators have suggested that the apparent intent of Congress was that this language should apply to dismissals on the grounds of jurisdiction as well as on the grounds of lack of merit. Berueffy, *The Three Judge Federal Court,* 16 Rocky Mtn. L. Rev. 64 (1942); 62 Harv. L. Rev. 1398 (1949); 28 Minn. L. Rev. 131 (1943). The Supreme Court has not yet construed this portion of the amendment, but the cases from the lower courts have generally continued to follow the *Poresky* rule to the effect that a single judge may dismiss if the District Court is clearly without jurisdiction and some race cases may have broadened the statutory court's jurisdiction. See cases discussed *infra.*

Local Issue Determinative

However it is definitely established that a three-judge court once having obtained jurisdiction by the presence of a substantial federal question, can give relief upon a non-constitutional ground or rest its decision solely on the basis of a local issue, without even passing upon the federal questions. Authority for this statement may be derived from *Louisville & N.R.Co. v. Garrett,* 231 U.S. 298, 34 S.Ct. 48, 58 L.Ed. 229 (1912); *Davis v. Wallace,* 257 U.S. 478, 42 S.Ct. 164, 66 L.Ed. 325 (1922); *Sterling v. Constantin,* 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1932); *Glenn v. Field Packing Co.,* 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252 (1933); *Lee v. Bickell,* 292 U.S. 415, 54 S.Ct. 727, 78 L.Ed. 1337 (1934); and *Railroad Commission v. Pacific Gas & Electric Co.,* 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319 (1938). Typical of these cases is the *Lee* case where the three-judge court took jurisdiction under plaintiff's allegations that certain Florida stamp taxes as appplied to the plaintiff constituted a denial of due process and a violation of the Commerce Clause of the Constitution. Without reaching the merits of the constitutional issues, the three-judge court granted the plaintiff the injunctive relief sought, basing its determination on an interpretation of the taxing statute. The court construed the statute as not applicable to the plaintiff and enjoined the state officers from collecting the taxes from the plaintiff. With a slight modification the Supreme Court of the United States affirmed the action of the three-judge court both as to jurisdiction and the merits.

The Supreme Court reflected a similar attitude in the *Pacific Gas* case where a three-judge district court had taken jurisdiction under allegations of the constitutional invalidity of a California rate order. The three-judge court determined that the order as enforced against the plaintiffs denied them due process and granted an injunction. The United States Supreme Court affirmed as to jurisdiction, but reversed for a new trial on the merits.

No Direct Appeal

However, even if a three-judge court is convened under proper allegations in the plaintiff's prayer for relief, when it becomes apparent that the plaintiff has no case for three judges, the case must be dismissed. No direct appeal will lie to the Supreme Court. For example, in *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.,* 292 U.S. 386, 54 S.Ct. 732, 78 L.Ed. 1318 (1934), plaintiff's prayer indicated a proper jurisdictional setting for a three-judge court, and such a court was convened. In vacating the final decree rendered by that court, the United States Supreme Court stated,

"The allegations against appellee officers, it is true, present on their face every prerequisite to three judge action. But when it became apparent, as it did upon the final

hearing, that there was never any basis for relief of any sort against the state officers, and the only matter in controversy was the right of [one of the defendants] to recover the alleged excess payments for gas, there was no longer any occasion for proceeding under § 266.

"The limitations of the statute would be defeated were it enough to keep three judges assembled that a plaintiff could resort to a mere form of words in his complaint alleging that the suit is one to restrain action of state officers, with no support whatever in fact or law. . . . When it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed and direct appeal here must fail. . . ." 292 U.S. at 391, 392.

VIII. INFERIOR COURT DECISIONS

Within the framework of the general statements and specific cases decided by the United States Supreme Court, the lower federal courts have decided a number of cases. The consideration of the inferior court decisions will be limited in this Study to those involving problems of alleged racial discrimination.[1]

In *Gray v. Board of Trustees of University of Tennessee*, 100 F.Supp. 113 (E.D.Tenn. 1951), Negro plaintiffs sought to enjoin the officials of a state university from denying plaintiffs admission to the College of Law and the Graduate School on the ground of race. Although plaintiffs alleged, and defendants admitted that the action of the officials was based on existing state statutes providing for segregation in such educational facilities, the three-judge court which had convened upon plaintiffs' request pursuant to § 2281, refused jurisdiction. The court stated,

> "We are of the opinion that the case presents a question of alleged discrimination on the part of the defendants against the plaintiffs under the equal protection clause of the 14th Amendment, rather than the unconstitutionality of the statutory law of Tennessee requiring segregation in education. As such, it is one for decision by the District Judge instead of by a three-judge court." 100 F.Supp. at 115.

Thereupon, the plaintiffs appealed the dismissal by the three-judge court to the Supreme Court and alternatively asked for mandamus to vacate the order of dismissal. The appeal was set for argument, postponing the determination

1. Inferior court decisions not involving race that have upheld the rules set out above governing three-judge court jurisdiction are numerous. For example, there is no question but that a single judge cannot dismiss on the merits: Snyder's Drug Stores v. Taylor, 227 F.2d 162 (8th Cir. 1955). But if the court is clearly without jurisdiction, it is proper for one judge to dismiss: Darlington v. Federal Housing Administration, 134 F.Supp. 337 (E.D.S.C. 1955) (attack on federal statute's time of effect, rather than its validity); Lee v. Roseberry, 94 F.Supp. 324 (E.D.Ky. 1950) (improper method of attack on federal statute) *aff'd* 200 F.2d 155 (6th Cir. 1952); Priceman v. Dewey, 81 F.Supp. 557 (E.D.N.Y. 1949) (single judge has power to dismiss where no equitable grounds for relief exist).

If the constitutional question has already been settled or is clearly lacking, there is no need for a three-judge court: Haines v. Castle, 226 F.2d 591 (7th Cir. 1955); Waddell v. Chicago Land Clearance Commission, 206 F.2d 748 (7th Cir. 1953); Grand Rapids City Coach Lines v. Howlett, 137 F.Supp. 667 (W.D. Mich. 1955); Davis v. City of Little Rock, 136 F.Supp. 725 (E.D.Ark. 1955); Andrew G. Nelson, Inc. v. Jessup, 134 F.Supp. 221 (S.D.Ind. 1955); O'Rourke v. Waterfront Commission, 118 F.Supp. 236 (S.D.N.Y. 1954); People of State of Illinois ex rel Sankstone v. Jarecki, 116 F.Supp. 422 (N.D.Ill. 1953) appeal dismissed, 346 U.S. 861, 74 S.Ct. 107, 98 L.Ed. 373 (1953); Robinette v. Chicago Land Clearance Commission, 115 F.Supp. 669 (N.D.Ill. 1951); New Jersey Chiropractic Ass'n. v. State Board, 79 F.Supp. 327 (D.C.N.J. 1948); Carras v. Monaghan, 65 F.Supp. 658 (W.D.Penna. 1946); Osage Tribe of Indians v. Ickes, 45 F.Supp. 179 (D.C.D.C. 1942) *aff'd. per curiam*, 77 App.D.C. 114, 133 F.2d 47 (1943), *cert. denied* 319 U.S. 750, 63 S.Ct. 1158, 87 L.Ed. 1704 (1943).

The single judge faced with a petition for a three-judge court must scrutinize the complaint to insure that jurisdiction exists; if it does not, he must dismiss: Wreiole v. Waterfront Commission of New York Harbor, 132 F.Supp. 166 (S.D.N.Y. 1955); Bradley v. Waterfront Commission of New York Harbor, 130 F.Supp. 303 (S.D.N.Y. 1955); Webb v. State University of New York, 120 F.Supp. 554 (N.D.N.Y. 1954), 125 F.Supp. 910 (N.D.N.Y. 1954); appeal dismissed 348 U.S. 867, 75 S.Ct. 113, 99 L.Ed. 683 (1954); Howard v. Ladner, 116 F.Supp. 791 (S.D.Miss. 1953); Linehan v. Waterfront Commission of New York Harbor, 116 F.Supp. 401 (S.D.N.Y. 1953).

The jurisdiction of a three-judge court is exclusive, and parties to an action may not waive the court. A request to convene a three-judge court raises a question of jurisdiction, not one of right or privilege: Riss & Co. v. Hoch, 99 F.2d 553 (10th Cir. 1938).

of the jurisdictional question, and a rule to show cause why the mandamus should not be granted was issued, 342 U.S. 846, 72 S.Ct. 84, 96 L.Ed. 639 (1951). Upon a filing of a response to the rule, the petition was set for argument with the appeal. However, before argument could be heard, the plaintiffs were admitted to the University, and the case was dismissed as moot. 342 U.S. 517, 72 S.Ct. 432, 96 L.Ed. 540 (1952).

Denial of Equal Protection

The theory of the district court in the *Gray* case, that the actions of the officials were denials of equal protection, rather than that the statutes under which they acted were unconstitutional, was again used in *Wichita Falls Junior College Dist. v. Battle*, 204 F.2d 632 (5th Cir. 1953), *cert. denied* 347 U.S. 974, 74 S.Ct. 783, 98 L.Ed. 1114 (1954). Although plaintiffs alleged that the policy of the defendant school officials in refusing plaintiffs admission because of their race was under color of Texas law, and defendants admitted their actions to be based on state law and announced that the policy would continue in effect until the state laws were declared unconstitutional, the district judge determined that a three-judge court was not required. In affirming, Judge Borah speaking for a unanimous Court, declared: "There is no necessity for deciding the constitutionality of any provision of Texas law in determining the fact issues which this case presents. [Citing cases]." 204 F.2d at 634.

The Court continued,

> ". . . [T]he question for decision is merely whether the policies, usages and customs of the appellants actually do discriminate against the appellees on account of their race and color in violation of the aforesaid Equal Protection Clause. Such an issue is a factual one and obviously does not address itself to a three-judge court." 204 F.2d at 635.

A like attitude, and even briefer discussion of the three-judge court problem, is to be found in *Beal v. Holcombe*, 193 F.2d 384 (5th Cir. 1951), *cert. denied* 347 U.S. 974, 74 S.Ct. 783, 98 L.Ed. 1114 (1954). Plaintiffs had there alleged that they had been denied the use of public golf courses in Houston, Texas and sought a declaratory judgment of their rights as well as an injunction ordering defendant city officials to permit the plaintiffs' use of the courses. In reversing a district court ruling adverse to plaintiffs, Judge Hutcheson summarily disposed of an allegation that the case required a three-judge court. "That [this] is not such a case, the literature on the subject and all the controlling decisions make crystal clear [citing Phillips v. U. S., *supra*]." 193 F.2d at 388. The court also placed emphasis on the point that the issue involved was solely a question of equal protection. Thus the courts in all three cases drew a distinction between the unconstitutionality of the actions of state officials and the unconstitutionality of the laws upon which those actions were based, a distinction previously approved by the United States Supreme Court. *Phillips v. United States, supra.*

The *Beal* case, by thus quoting with approval the *Phillips* case, seems to suggest that the reason that courts should draw such a distinction is to be found in the Congressional policy, as interpreted in *Phillips*, calling for a narrow construction of § 2281 with emphasis on "limitation" rather than on "a measure of broad social policy." Under such a construction the courts are thus prone to avoid the issue of unconstitutionality of state legislation, which might bring the case within the purview of the three-judge court, and look for other constitutional grounds upon which to base their decisions. If the court is successful in its search, a three-judge court is consequently not required.

On the other hand, in *Constantine v. Southwestern Louisiana Institute*, 120 F.Supp. 417 (W.D.La. 1954) a similar complaint against the actions of school officials was held to require a three-judge court.

> ". . . [P]laintiffs seek to enjoin the enforcement or execution of an order made pursuant to the policies or laws of Louisiana on the ground that either the policies or laws of the State or both violate rights secured to the petitioners under the Constitution and laws of the United States. The action was brought against State officers and was precisely drawn for the purpose of requiring the convening of a three-judge court under Section 2281 et seq., Title 28 U.S.C. The subject matter is properly cog-

nizable by a three-judge court. [citing cases.]" 120 F.Supp. at 418.

There was no appeal from the case. A similar conclusion was reached in *Wilson v. Board of Supervisors,* 92 F.Supp. 986 (E.D.La. 1950), *aff'd per curiam,* 340 U.S. 909, 71 S.Ct. 294, 95 L.Ed. 657 (1951). Here, plaintiffs sought a temporary as well as a permanent injunction restraining defendant school authorities from denying plaintiffs admission to the Louisiana State University Law School because of race. A three-judge court took jurisdiction and ordered the admission of the plaintiffs.

Uncertainty in Area

Illustrative of the uncertainty in this area is the case of *Board of Supervisors of Louisiana State University v. Tureaud,* which has been several times before the courts. Prior to the *School Segregation Cases* Negro plaintiffs instituted a suit in the federal District Court for the Eastern District of Louisiana seeking an injunction to require their admission to the Louisiana State University. *Tureaud v. Board of Supervisors,* 116 F.Supp. 248 (E.D.La. 1953). Ignoring the fact that the plaintiff's prayer alleged the unconstitutionality of Louisiana state law as well as praying for injunctive relief,[2] the one-judge district court took jurisdiction of the case. Stating that plaintiffs' cause arose under the Constitution and laws of the United States and that the plaintiffs sought "redress for the deprivation of civil rights guaranteed by the Fourteenth Amendment", 116 F.Supp. at 251, the district judge proceeded to decide the case solely on the grounds of equal protection. The problem of the three-judge court was not discussed, even though the plaintiff's prayer had specifically invoked the jurisdiction of the court under Section 2281.[3] No statutes of the State of Louisiana were construed. However, the court granted a temporary injunction, recognizing the separate-but-equal doctrine as valid law, but finding that the facilities in Louisiana for Negroes did not meet the test of substantially equal facilities.

2. The opinion of the District Court makes no mention of this aspect of the complaint. This information comes from the opinion of the Court of Appeals in the case, Board of Supervisors v. Tureaud, 207 F.2d 807 (5th Cir. 1953), at pages 807, 808.
3. This information is likewise from the opinion of the Court of Appeals at the same pages.

Urged Narrow Construction

On appeal to the Court of Appeals, Judge Hutcheson held, for a majority of the Court, that the complaint required the convening of a three-judge court. *Board of Supervisors v. Tureaud,* 207 F.2d 807 (5th Cir. 1953). The plaintiffs, seeking to preserve the injunction granted by the court below, strongly urged that the settled history and construction of Section 2281 called for a narrow and technical construction of the statute under the doctrine of *Phillips v. United States* and that the facts of the instant case fell far outside this limited jurisdiction of the three-judge statute. The court refused to follow this reasoning, stating in reply,

> "It is therefore, a misconstruction of the decision in *Phillips v. United States* . . . to conclude that the Supreme Court intended therein to label this highly remedial statute as a mere technicality to be evaded and circumvented by a single district judge at will. Indeed, the appellees in their brief themselves state the correct rule thus: 'Where the technical jurisdictional prerequisites of Section 2881 [sic] are met, a three-judge court becomes mandatory,' citing many cases.
>
> "It is true that the plaintiff has it in his own hands to determine by the allegations of his complaint, in the first instance, whether a three-judge court should be summoned, and, further, if, as originally drawn, his complaint presents a case for three judges, he may by amendment to or abandonment of his claim requiring the constitution of a three-judge court, enable the district judge to proceed alone. This was many times taken advantage of, under the statute before it was amended to provide a three-judge court in all cases where an injunction was sought, by the action of the plaintiff, if he desired one judge action, in dismissing his prayer for interlocutory injunction. Emphatically, however, the statute does not permit the district judge to pick and choose among the allegations of a complaint and, ignoring those which require the constitution of a three-judge court, proceed with the case *as though those allegations had never been in, or had been dismissed from, the complaint.*" 207 F.2d at 809. (Emphasis by the court).

The plaintiffs also relied on *Wichita Falls Jr. College Dist. v. Battle*, discussed *supra*. In refusing to follow this case the court stated,

> "[That case] will not at all do. That case was not in any view a case for three judges. As was carefully and correctly pointed out in the footnotes to that opinion, Art. 7 of the Constitution of the State of Texas, and [the applicable Texas statute provided for separate but equal school facilities and] also provided, 'and impartial provision shall be made for both.' This being so, it would have been difficult, if not impossible, in the light of [citing cases including *Gray v. University of Tennessee*, discussed *supra*] to state a case, short of one attacking segregation per se, which was an attack upon that constitution and that statute as unconstitutional on their face. *In addition, the suit was not brought, as here, to enjoin an order of a state administrative body. On the contrary, the suit was an ordinary suit under the civil rights acts to enjoin practices instituted by the defendants named, under color of state law, which in themselves were violative of plaintiffs' civil rights.* 207 F.2d at 809, 810. (Emphasis by the court).

The majority concluded on the note that since the complaint sought injunctive relief against the alleged unconstitutionality of a section of the Louisiana constitution and specified Louisiana statutes,

> "We are in no doubt that the suit from which this appeal comes was one for three judges, [and] that the district judge was without jurisdiction to hear and determine the application for injunction. . . . Reversed and remanded." (Footnote by the court omitted.) 207 F.2d at 810.

The dissent disagreed with the majority on the specific grounds that the only issue involved in the case was the factual one necessary to determine if the plaintiffs had been denied equal protection, and that the three-judge court was not pertinent to the discussion as clearly there was no attack on the state statute. The dissent maintained:

> "The complaint in this case did not challenge segregation *per se*. It was framed upon the assumption that, under the present state of the law, segregation is valid if equal facilities are provided." 207 F.2d at 811.

School Segregation Cases

While a petition for certiorari in this case was pending before the Supreme Court, the *School Segregation Cases* were decided. The Court subsequently granted the petition, vacated the judgment of the Court of Appeals in a brief per curiam opinion and remanded the case "for consideration in the light of the Segregation Cases . . . and conditions that now prevail." *Tureaud v. Board of Supervisors*, 347 U.S. 971, 74 S.Ct. 784, 98 L.Ed. 1112 (1954), 1 Race Rel. L. Rep. 14 (1956).

On remand to the Court of Appeals and thence to the district court, the latter again granted a temporary injunction requiring the admission to the University of the Negro plaintiffs. No new evidence was taken.[4] On subsequent appeal from this decree to the Court of Appeals, *Board of Supervisors of La. State U. etc., v. Tureaud*, 225 F.2d 434 (5th Cir. 1955), 1 Race Rel. L. Rep. 101 (1956), Judge Rives, in writing for a majority of that court, recited the complete history of the case and concluded that the Supreme Court by its actions had necessarily held "that the matters for consideration and decision were within the jurisdiction of this court and of the one-judge district court from which it came." 225 F.2d at 435. The Court of Appeals then affirmed the district court.

Judge Rives, in addition to writing the brief per curiam majority opinion, specially concurred in a short separate opinion in which he pointed out that he had dissented in the case upon first appeal (discussed *supra*). He then reaffirmed his prior stand, adding,

> ". . . [A] three-judge court is authorized only when the claim of unconstitutionality presents a substantial federal question. It

4. There was no report of the second decision of the District Court; instead the Court relied on the findindgs of fact and conclusions of law made upon the first trial of the case, Tureaud v. Board of Supervisors, 116 F.Supp. 248 (E.D.La. 1953). This information, together with that to the effect that no new evidence was taken by the District Court, comes from the second opinion of the Court of Appeals, Board of Supervisors of La. State U. v. Tureaud, 225 F.2d 434 (5th Cir. 1955) at page 435.

has long been settled that a question of constitutionality may be plainly unsubstantial because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy' [citing cases] Ex parte Poresky [*supra*]. A federal question may become unsubstantial by virtue of an intervening Supreme Court decision, California Water Service Co. v. Redding [*supra*]. The Supreme Court has now made its meaning unmistakably clear that . . . 'racial discrimination in public education is unconstitutional,' and that, 'All provisions of . . . state, or local law requiring or permitting such discrimination must yield to this principle.' Brown v. Board of Education, 349 U.S. 294, 298, 75 S.Ct. 753, 755 [99 L.Ed. 1083, 1105 (1955)] . . . [Therefore] it seems to me that no substantial federal question is presented as to the unconstitutionality of the provisions of the Louisiana State Constitution. . . . The Supreme Court has already passed on the question. . . . [I]t is therefore frivolous." 225 F.2d at 446.

Effect of Abandoned Claim

Judge Cameron, dissenting in a full opinion, reaffirmed the stand taken by the majority in the prior appeal and further pointed out that the plaintiff in his petition for certiorari before the Supreme Court admitted that in the District Court he had "abandoned his claim to a hearing before a [three-judge court]" and now based his case "solely [upon] . . . whether the educational opportunities, offerings and facilities at Southern University, the state supported institution of higher learning for Negroes, were equal or substantially equal to those available at Louisiana State University." 225 F.2d at 444. In the first of his dissent Judge Cameron had stated he was of the opinion that the appellee should clarify his position "so that the question of a Three-Judge Court could be intelligently passed upon." 225 F.2d at 435.

Thus the *Tureaud* litigation ended on a note of uncertainty as to its value as a statement of the proper rules concerning the application of the three-judge court statute.

The reversal by the Supreme Court may indicate the dissatisfaction of that Court with the stand taken by the Court of Appeals on the three-judge court issue; on the other hand the Supreme Court may have implied only that the plaintiff was entitled to relief in any event "in light of the *Segregation Cases.*"

Kentucky Case

In a case arising from Kentucky, *Willis v. Walker*, 136 F.Supp. 181, (W.D.Ky. 1955), 1 Race Rel. L. Rep. 64 (1956), plaintiffs sought an injunction against officers of the public schools of a Kentucky county, alleging the invalidity of provisions of the Kentucky constitution and statutory laws relative to segregation. A three-judge court was constituted in response to the prayer of the complaint. The defendants, however, upon oral argument, "freely conceded that such constitutional and statutory provisions are invalid by reason of the Supreme Court's decision in [the *School Segregation Cases*]." 136 F. Supp. at 183. Pointing out that a susbstantial constitutional issue is necessary for jurisdiction under Section 2281, the Court stated,

> ". . . [L]ack of substantiality may appear either because it [the allegation of unconstitutionality] is obviously without merit or because its unsoundness so clearly results from the previous decisions of the Supreme Court as to foreclose the subject." 136 F.Supp. at 183.

The court then concluded that since the constitutional question was not in issue, the three-judge court did not have jurisdiction of the case; that the three-judge court should be dissolved; and that the case should be decided by a single district judge. [For the opinion by the single judge on the merits, see *Willis v. Walker*, 136 F.Supp. 177 (W.D.Ky. 1955), 1 Race Rel. L. Rep. 66 (1956)]. To the same effect are: *Bush v. Orleans Parish School Board*, 138 F.Supp. 336 (E.D. La. 1956) 1 Race Rel. L. Rep. 305 (1956) motion for leave to file petition for writ of mandamus denied, —— U.S. ——, 76 S.Ct. 854, —— L.Ed. ——. [For the opinion by the single judge on the merits, see *Bush v. Orleans Parish School Board*, 138 F.Supp. 337 (E.D.La. 1956), 1 Race Rel. L. Rep. 306 (1956)]; *Kelley v. Board of Education of the*

City of Nashville, 139 F.Supp. 578 (M.D.Tenn. 1956), 1 Race Rel. L. Rep. 519 (1956).

Effect of Concession

In *Dunn v. Board of Education of the County of Greenbrier,* 1 Race Rel. L. Rep. 319 (S.D.W.Va. 1956) Negro plaintiffs brought an action against school officials to require desegregation. A single-judge federal court assumed jurisdiction, recognizing that although constitutional and statutory provisions of West Virginia required segregation, "said constitutional and statutory provisions are, and are conceded by defendants to be unconstitutional because they are in conflict with provisions of the Constitution of the United States." 1 Race Rel. L. Rep. at 320. To the same effect on the point of jurisdiction are: *Booker v. Board of Education,* 1 Race Rel. L. Rep. 118 (W.D.Tenn. 1956), motion for leave to file petition for writ of mandamus denied, —— U.S. ——, 76 S.Ct. 856, —— L.Ed. —— (1956); *Taylor v. Board of Education of the County of Raleigh,* 1 Race Rel. L. Rep. 321 (S.D.W.Va. 1956), and *Bell v. Rippy,* 1 Race Rel. L. Rep. 318 (N.D.Tex. 1955).

The per curiam orders and memorandum decisions of the Supreme Court have done little to clarify the matter. For example, in *Frasier v. Board of Trustees of the University of North Carolina,* 134 F.Supp. 589 (M.D.N.C. 1955), 1 Race Rel. L. Rep. 115 (1956), a three-judge court was convened under the authority of § 2281. The case involved a prayer by Negroes for an injunction directing the Board of Trustees of the University of North Carolina to admit plaintiffs to the University. The plaintiffs did not challenge the assertion made by the defendants that the educational facilities provided for Negroes by the state were adequate and equal. Ignoring any possible allegation that Equal Protection had been denied, the plaintiffs concentrated their attack directly on the rule passed pursuant to a statute by the Trustees of the University which prevented the admission of Negro students. The defendants urged that the case was not one for a three-judge court, since there was no constitutional or statutory provision which barred the admission of Negroes to the University or required persons admitted to the University to be segregated on account of their color. They argued that the segregation laws applied only to grade schools. The Court, however, took jurisdiction under § 2281. Citing *Wilson v. Board of Supervisors,* 92 F.Supp. 986 (E.D.La. 1950), *aff'd per curiam* 340 U.S. 909, 71 S.Ct. 294, 95 L.Ed. 657 (1951), discussed *supra,* the Court said:

> ". . . [A] three-judge court is required when an injunction is sought because of the unconstitutionality of the order of a State administrative board . . . and it follows that the regulation now under attack must be considered a 'statute' to which the State has given its sanction within the meaning of the jurisdictional provisions of 28 U.S.C. § 2281." 134 F.Supp. at 591.

"Substantial" Issue Unraised

Going to the merits, the Court noted that the regulation under attack was promulgated after the *School Segregation Cases;* held the regulation unconstitutional in the light of these decisions; and granted the injunction. Although the defendants' answer had contended that the *School Segregation Cases* should not be controlling in the field of higher education, the court peremptorily rejected this argument and no mention was made of the possibility of refusing jurisdiction under § 2281 for lack of a *substantial* constitutional question. On direct appeal, the Supreme Court affirmed by per curiam order, 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. °350 (1956). On the other hand, in *Covington v. Montgomery County School Board,* 139 F.Supp. 161 (M.D.N.C. 1956), 1 Race Rel. L. Rep. 516 (1956), decided seven months after the *Frasier* case, a single judge declined to convene a three-judge court in a suit brought against county school officials seeking admission of Negro plaintiffs to public schools without regard to race. The judge held that the *School Segregation Cases* together with the *Frasier* case rendered "null and void any law in this State compelling the segregation of the races,—whether in the schools for higher education or on the lower level." 139 F.Supp. at 163.

In the *Frasier* case Negro plaintiffs had challenged the validity of state constitutional provisions, state statutes, and state administrative orders and legislative policy and had sought injunctions against the school officials. In order to affirm the *Frasier* case the Supreme Court had

to have jurisdiction, which within § 2281 means the case was properly before the three-judge court in the first instance. In the *Covington* case, the district court refused to convene a three-judge court because the provisions sought to be enjoined were deemed to have been clearly declared unconstitutional. The court stated;

> "Nor is any statute,—state or local—, or order of a Board compelling segregation in the public schools, a legal controversy now. . . . In the administration of the law by the courts every Judge is . . . bound by the Constitution as last interpreted and construed by the Supreme Court of the United States. . . .
>
> ". . . If, then, the State Constitution or statutes or orders require that separate schools for the races must be maintained, it follows as the night the day that, being in conflict with the Constitution of the United States as defined by the Supreme Court, they are to that extent, null and void. No three-judge court is necessary to make that declaration." (Footnote by the court omitted.) 139 F.Supp. at 165.

However, the *School Segregation Cases*, which announced the unconstitutionality of these laws, were decided prior to either case. The apparent conflict on the question of jurisdiction in the *Covington* and *Frasier* cases can perhaps be reconciled by noting the language of the *Frasier* case in discussing the defense by the attorney general of North Carolina. The three-judge Court said:

> ". . . [T]he only defense on the merits of the cases offered by the defendants in this suit, is that the Supreme Court in [the *School Segregation Cases*] decided that segregation of the races was prohibited by the 14th Amendment only in respect to the lower public schools and did not decide that the separation of the races in schools on the college and university level is unlawful. We think that the contention is without merit." 134 F.Supp. at 592.

Constitutional Question Decided

However, in deciding the merits, the court in fact decided a constitutional question, for which the three-judge court is required, and thus gave jurisdiction under § 1253 for a direct appeal to the Supreme Court; whereas in the subsequent *Covington* decision, the single-judge court in view of the *School Segregation Cases* and the *Frasier* case found no substantial constitutional question to permit the convening of a three-judge court, notwithstanding the allegations in the complaint that the North Carolina law was unconstitutional.

In *Williams v. McCulley*, 128 F.Supp. 897 (W.D.La. 1955) a three-judge court took jurisdiction (but dismissed for insufficiency of evidence to support the claim) of a class action brought by Negroes alleging that state officers discriminated against their voting rights. The plaintiffs assailed the constitutionality of the Louisiana law that required prospective voters to pass a reading test. The court found no discrimination and declined to reach the constitutional issue, stating,

> ". . . [W]e are not at liberty to impose on state and local authorities our conception of what constitutes a proper administration of their offices, so long as there is no discrimination and the laws are equally administered." 128 F.Supp. at 899.

CONCLUSION

In view of the fact that a substantial federal question is necessary to invoke the jurisdiction of a three-judge court under Tit. 28 U.S.C.A. § 2281, as set out above; and in view of the statements of the Supreme Court in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 653 (1955) to the effect that ". . . [R]acial discrimination in public education is unconstitutional . . . ," and that "All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle"; the three-judge court would seem to be ousted from jurisdiction in subsequent cases involving attacks on segregated school facilities. However, the question of its proper jurisdiction should continue to be a vital problem in other areas of litigation involving race relations.

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